

No. 11376

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE HOME INSURANCE COMPANY OF
NEW YORK, a Corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED

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PAUL P. O'BRIEN,

CLERK

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1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

2. The second part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

3. The third part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

4. The fourth part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

VELIKANJE & VELIKANJE,

Miller Building,

Yakima, Washington,

Attorneys for Plaintiff-Appellee.

CHENEY, HUTCHESON & GAVIN,

Miller Building,

Yakima, Washington,

Attorneys for Defendant-Appellant.

In the Superior Court of the State of Washington
in and for Yakima County

No. 33584

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a Corporation,
Defendant.

SUMMONS

The State of Washington, to the said Home Insurance Company of New York, Defendant:

You are hereby summoned and required to be and appear within twenty (20) days after the service of this summons upon you, exclusive of the day of service, if served within the State of Washington, or within sixty (60) days after service of this Summons upon you, exclusive of the day of service, if served out of the State of Washington, and answer the Complaint and serve a copy of your answer upon the undersigned attorneys at the place below specified and defend the above entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the Complaint, a copy of which is herewith served upon you (or which will be filed with the Clerk of said Court within

five (5) days after service of this Summons upon you).

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff.

[Endorsed]: Filed April 20, 1945. [1*]

[Title of Superior Court and Cause.]

COMPLAINT

Comes now the plaintiff and complains and alleges as follows, to-wit:

1.

That the plaintiff is engaged in business as the Barnes-Woodin Fur Department in the City of Yakima, Washington, and has filed with the Clerk of Yakima County his Business Certificate of Assumed Name.

2.

That the defendant is a corporation doing business in the State of Washington.

3.

That beginning on the 17th day of August, 1942, the defendant, Home Insurance Company of New York, entered into a written contract with said plaintiff whereby said defendant agreed to insure the plaintiff against loss on furs or garments trimmed with fur, being the property of customers

* Page numbering appearing at foot of page of original certified Transcript of Record.

accepted by the assured for storage, alteration, repairing, cleaning or remodeling, while said furs or garments trimmed with furs were in the custody or in the control of the plaintiff. That said agreement was incorporated in a written contract termed Furriers—Customers Basic Policy, being No. FC1824; said policy further provided upon an attached endorsement that this policy was extended to cover, during transportation or otherwise, such furs or garments trimmed with fur the property of customers, for which the assured has [2] issued a Certificate of Insurance on forms approved by the Company, and further providing that an additional premium was made payable for this additional coverage of the issuance of such Certificate. That said defendant has a copy of said contract and endorsement.

4.

That under the terms and conditions of said Policy the defendant Company obligated itself to any loss not to exceed the sum of \$100,000.00.

5.

That at all times herein mentioned from and after the 17th day of August, 1942, said policy was in full force and effect, all premiums having been paid and plaintiff having complied with all the terms and conditions of said policy.

6.

That on or about the 9th day of May, 1944, a loss was sustained at plaintiff's place of business at 301

East Yakima Avenue in Yakima, Washington, which was a loss by fire originating from an unknown cause and not the result of any negligence on the part of the plaintiff, his agent or employees. That as a result of said fire, 154 furs, fur coats and articles trimmed with fur belonging to customers, which were in the custody and control of the assured for alteration, repairing, cleaning, remodeling, preparation for storage, return to customers, and in storage, were destroyed or seriously damaged at a loss of \$30,695.00. That said articles, at the time of said loss, were in the storage rooms of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington.

7.

That on the 21st day of August, 1944, being within the extended time of filing proof of claims, the plaintiff caused to be filed with the Home Insurance Company and its agent Fire Company Adjustment Bureau, Inc., detailed proof of loss, showing loss in the sum of [3] \$29,785.00. That said defendant has in its possession said Proofs of Loss and the originals thereof.

8.

That in addition to the amounts set forth in plaintiff's Proof of Loss, several of said customers' garments and furs were covered by certificate endorsements, being special certificate policies, covering an amount beyond that as listed under the assured's legal liability. That said customers had paid an additional premium for said additional coverage and had filed with said Company due proof of loss. That

under a letter dated October 4, 1944, the law firm of Cheney & Hutcheson returned to said customers and policy holders their Proof of Loss with the notation that settlement would be completed with them. That the persons holding such certificates of endorsements and the amounts of loss suffered by them and shown by Proof of Loss under said certificate are as follows:

Mrs. W. H. Beerman.....	\$450.00
Mrs. Gregory Bitter	400.00
Mrs. George Fortier	225.00
E. E. Leach	250.00
Carl Lowenthal	225.00
Elaine McCorkindale	350.00
Dorthea Stanley	800.00
Irene Bryson	400.00

making an additional amount payable to said insureds' of \$1500.00 in excess of the amounts listed in the original Proof of Loss. That said parties had filed due proof of loss with said Company within the time allowed under said certificate policies. That it was discovered after the filing of Proof of Loss that the coat of L. C. Lindsey in the amount of \$375.00, Mrs. Harry Rollis in the amount of \$90.00, and Mrs. Earl Evans in the amount of \$125.00, were not lost or destroyed in said fire, thereby reducing said amount in the sum of \$590.00, making an actual loss of \$30,695.00.

9.

That plaintiff has consummated settlement with all of said parties, including certificate holders, ex-

cept the following names [4] with the value of the articles listed:

Clara Harbin	\$200.00
Mrs. William McClure	30.00
Mrs. William McClure	150.00
Mabel Miller Ray	200.00
Dorothy Riggs	350.00
Mabel G. Smith	150.00

Or a total of.....\$1,080.00

to whom plaintiff is obligated and with whom plaintiff is advised, and therefore alleges, that defendant has made no settlement.

10.

That defendant, pursuant to the service of Proof of Loss, has paid to plaintiff the sum of \$8,200.00, leaving a balance now due and owing in the sum of \$22,495.00, together with interest at 6% per annum from May 9, 1944, until paid; which amount plaintiff has demanded of defendant and which defendant has refused to pay.

Wherefore, plaintiff prays that it have judgment against the defendant Home Insurance Company of New York in the sum of \$22,495.00 together with interest at 6% per annum from May 9, 1944, until paid, together with such other and further relief as to the court may seem meet and proper, together with costs and disbursements herein incurred.

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff. [5]

State of Washington,
County of Yakima—ss.

Meryl Kirkevold, being first duly sworn on oath, deposes and says: That he is the plaintiff in the within and foregoing action; that he has read his complaint herein, knows the contents thereof and the same is true as he verily believes.

MERYL KIRKEVOLD.

Subscribed and sworn to before me this 19th day of April, 1945.

E. FREDERICK VELIKANJE,
Notary Public in and for the State of Washington,
residing at Yakima. [6]

This instrument served upon the Insurance Commissioner of the State of Washington April 23, 1945 at 10:15 a.m. Wm. A. Sullivan, Insurance Commissioner. By A. E. G.

[Title of Superior Court and Cause.]

SPECIAL APPEARANCE

Comes now the defendant, The Home Insurance Company of New York, a corporation, and enters its special appearance herein through its undersigned attorneys, Cheney, Hutcheson & Gavin, solely for the purpose of removing this cause from the above entitled court to the United States District Court for the Eastern District of Washington, Southern Division.

Dated this 7th day of May, 1945.

CHENEY, HUTCHESON &
GAVIN,

Attorneys for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 10, 1945. [7]

[Title of Superior Court and Cause.]

NOTICE OF INTENTION TO FILE PETITION
AND BOND FOR REMOVAL

To: Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, the above named plaintiff; and

To: Velikanje & Velikanje, attorneys for plaintiff:

You, and Each of You, Will Please Take Notice that The Home Insurance Company of New York, a corporation, the defendant in the above entitled cause, appearing specially and not otherwise, will hereafter and on or before the 11th day of May, 1945, file in the above entitled court and cause and in the clerk's office of said court in which said suit is now pending, its petition and bond for removal of the said above entitled cause from the said above entitled court to the District Court of the United States for the Eastern District of Washington, Southern Division, and that on the 12th day of May, 1945, at nine thirty o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard,

said petition and bond for removal will be called up for hearing and disposition before the above entitled court in which this proceeding is pending, at which time and place you may be present if you so elect; and at said time the said defendant will present to one of the judges of the above named court at his courtroom in the court house at Yakima, Yakima County, Washington, for his signature, an order removing the above entitled action into the said District [8] Court of the United States for the Eastern District of Washington, Southern Division, pursuant to the statutes of the United States in such cases made and provided.

Copies of said petition and bond for removal and order of removal are served upon you herewith.

Dated this 7th day of May, 1945.

CHENEY, HUTCHESON &
GAVIN,

Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed May 10, 1945. [9]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

Comes now The Home Insurance Company of New York, a corporation, the defendant above named, and appearing herein specially for the sole and exclusive purpose of presenting and filing this petition and effecting the removal hereinafter re-

ferred to, and for no other, shows and alleges as follows:

1.

That heretofore and within sixty days last past the above entitled action, which is an action at law of a civil nature, was brought and commenced in the above entitled court by the above named plaintiff against your petitioner as defendant. That said petitioner, The Home Insurance Company of New York, a corporation, at the time of the commencement of said action was, and ever since has been, and now is a foreign corporation duly created, organized, operating and existing under and by virtue of the laws of the State of New York, and that at all of said times said petitioner has been and now is a resident, citizen and inhabitant of the State of New York, and not a resident, citizen or inhabitant of the State of Washington.

2.

That the plaintiff herein, Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, at the time of the commencement of said action was, ever since has been, and now is a resident, citizen or [10] inhabitant of the State of Washington, and not a resident, citizen or inhabitant of the State of New York, or of any other state.

3.

That the above entitled action is an action at law of a civil nature for the recovery of judgment in the sum of \$22,495.00, exclusive of interest and costs, alleged to be an unpaid balance due upon a fire in-

insurance policy issued by the defendant to the plaintiff herein, all of which more fully appears from plaintiff's complaint on file herein, reference to which complaint is filed is hereby made. That a bona fide and actual controversy exists and will exist in this action between the plaintiff and the defendant in that the defendant denies absolutely any liability whatever to the plaintiff herein except the sum of \$1800.00. That the amount in controversy in said action, as fully appears from the foregoing and from the record herein, is now and at the time of the commencement of this action was, and ever since said time has been, in amount or value in excess of \$3,000.00, to-wit, the amount or value of \$20,695.00, exclusive of interest and costs.

4.

That this said action is pending undetermined in this court and that the time for the defendant, your petitioner, to answer, demur, or otherwise plead to plaintiff's complaint filed herein has not expired under the laws of the State of Washington or the rules of the above entitled court, in such cases made and provided, and that no application has been made to any court or judge for the order to be applied for in this petition. That service of the summons and complaint in this action was made upon the defendant herein by serving the State Insurance Commissioner of the State of Washington on or about the 23rd day of April, 1945. That under the laws of the State of Washington and the rules of the above entitled court the said defendants are required to ap-

pear and answer the same or [11] otherwise plead to said complaint within twenty days from the date of the service of said summons upon them; and that said period has not now expired. That this action is, as aforesaid, one of a civil nature at law of which the District Court of the United States for the Eastern District of Washington, Southern Division, has original jurisdiction, and that, as hereinabove stated, the amount and value in controversy herein is in excess of \$3,000.00 exclusive of interest and costs, and that the controversy herein between the plaintiff and your petitioner as aforesaid is wholly between citizens and residents of different states.

5.

That your petitioner desires to remove this action before the trial thereof and within thirty days from the filing of this petition, into the District Court of the United States for the Eastern District of Washington, Southern Division, that being the district in which this action is pending, and your petitioner makes and files with this petition a bond in due and legal form, with good and sufficient surety thereon, for its entering in said District Court of the United States within thirty days from the date of filing this petition a copy of the record in this action and for its paying of all costs which may be awarded by said District Court of the United States for the Eastern District of Washington, Southern Division, if said district court shall hold that this action was wrongfully or improperly removed thereto.

6.

That due written notice of this petition and said

bond for removal and of the presentation and proposed filing thereof has been duly given to and served upon the plaintiff herein prior to the filing of the same. [12]

Wherefore, your petitioner prays that said surety and said bond may be accepted and approved and that this action may be removed into the said District Court of the United States for the Eastern District of Washington, Southern Division, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had thereon in this court except the order to remove as required by law, and that your honorable court make and enter an order approving said bond and an order of removal of this action, and to that end your petitioner will ever pray.

CHENEY, HUTCHESON &
GAVIN,

Attorneys for Defendant.

State of Washington,
County of Yakima—ss.

Elwood Hutcheson, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant in the above entitled action, and that he makes this verification for and on behalf of said defendant, for the reason and on the ground that no officer of the corporation defendant is now present in the State of Washington, and that he is duly authorized so to do. That he has read the above and

foregoing petition for removal, knows the contents thereof and believes the same to be true.

ELWOOD HUTCHESON

Subscribed and sworn to before me this 7th day of May, 1945.

[Seal] GORDON HANSON,

Notary Public for Washington, residing at Yakima, therein.

(Acknowledgment of Service.)

[Endorsed]: Filed May 10, 1945. [13]

[Title of Superior Court and Cause.]

BOND FOR REMOVAL

Know All Men by these Presents:

That we, The Home Insurance Company of New York, a corporation, as Principal, and the American Casualty Company of Reading, Pennsylvania, as Surety, are held firmly and bound until Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, Plaintiff in the above entitled action, in the penal sum of Five Hundred and no/100 Dollars (\$500.00), lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our respective successors and assigns, jointly and severally, firmly by these presents.

Upon Condition, Nevertheless, That

Whereas, the said The Home Insurance Company of New York, a corporation, Defendant herein, has petitioned the Superior Court of the State of Washington, in and for Yakima County, for the removal of the above entitled cause therein pending, wherein the said Meryl Kirkevold, doing business as Barnes-Woodin Fur Department is the Plaintiff and the said The Home Insurance Company of New York, a corporation, is Defendant, to the United States District Court for the Eastern District of Washington, Southern Division.

Now, if the said The Home Insurance Company of New York, a corporation, defendant, shall enter into the said United States District Court for the Eastern District of Washington, Southern Division, within [14] thirty days from the date of filing said petition, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said United States District Court if said Court shall hold that this suit is wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

THE HOME INSURANCE COMPANY
OF NEW YORK, a corporation,

By ELWOOD HUTCHESON,

Their Attorney.

[Seal] AMERICAN CASUALTY COMPANY
OF READING, PENNSYLVANIA,

By JAMES W. ORKNEY,

Attorney-in-Fact.

Service accepted and copy received this 10th day of May, 1945.

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff.

Approved:

N. K. BUCK,
Judge.

[Endorsed]: Filed May 12, 1945. [15]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

The above entitled cause having duly and regularly come on for hearing at this time upon the special appearance and petition for removal of the defendant, The Home Insurance Company of New York, a corporation, duly filed herein, the plaintiff appearing through his attorney, Velikanje & Velikanje, and the defendant appearing specially for the purpose of praying the removal of the above entitled suit from the Superior Court of the State of Washington for Yakima County to the District Court of the United States for the Eastern District of Washington, Southern Division, and not otherwise, through its attorneys Cheney, Hutcheson & Gavin; and the court having heard the arguments of counsel and having duly considered said petition and the record in this case and being duly advised in the premises, finds as follows:

That this cause is an action of a civil nature at

law and that the amount in dispute and controversy, exclusive of interest and costs, is now and at the time of the commencement of this suit was, and ever since time has been, the sum of \$20,695.00, and in excess of the sum of \$3000.00, exclusive of interest and costs; that the controversy in this suit is now, and at the time of the commencement of this suit was, and ever since has been between [16] citizens and residents of different states; that the plaintiff at the time of the commencement of this action was and now is a citizen, resident, and inhabitant of the State of Washington, and not a citizen, resident, or inhabitant of the State of New York or any other state; that the defendant The Home Insurance Company of New York, a corporation, at the time of the commencement of this action was, and ever since has been, and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of New York and was then and is now a citizen, resident, and inhabitant of the State of New York, and not a citizen, resident or inhabitant of the State of Washington or of any other state; and that said condition of citizenship has so existed at all times since the commencement of this suit.

And it further appearing to the court that this suit is pending undetermined in this court and that the time within which the said defendant is required by the laws of the State of Washington or the rules of this court to demur, answer, or otherwise plead to the complaint of the plaintiff had not expired at the time the defendant's special appear-

ance and petition for removal were filed herein, and that no application had previously been made to any court or judge for the order applied for in said petition;

And it further appearing to the court that the said defendant has made and filed herein a petition for removal in the form and at the time and in the manner and in all other respects as provided by law, and that the plaintiff's objections to said removal are not well taken and should be overruled, and that the defendant has made and filed herein a bond for removal in the penal sum of \$500.00 in due form and duly executed with good and sufficient surety, duly conditioned for its entering within said District Court within thirty days from the date of filing said petition, a certified copy [17] of the record in said action and for paying all costs which may be awarded by said District Court if it shall hold that said action is wrongfully or improperly removed thereto, and that written notice of the filing and presentation of said petition and bond, in the form, at the time, and in the manner, and in all respects as provided by law, has been given;

And it further appearing to the court that the said petition and bond are sufficient to authorize the removal of said suit to the District Court of the United States for the Eastern District of Washington, Southern Division, and that the said petition for removal should therefore be allowed and this suit removed to said District Court;

Now, Therefore, it is Hereby Ordered, Considered,

Adjudged and Decreed that said petition for removal and bond be, and they are hereby approved and accepted; and that the above entitled suit be, and it is hereby removed to the District Court of the United States for the Eastern District of Washington, Southern Division, sitting at Yakima, Washington, and that the clerk of this court be, and he is hereby authorized and directed to forthwith prepare and certify a complete transcript of the record of said cause for filing in and with the clerk of said District Court at Yakima, Washington, within the time allowed by law; and that all of the proceedings in this court are hereby stayed.

Done in Open Court this 12th day of May, 1945.

N. K. BUCK,

Judge.

Presented by:

CHENEY, HUTCHESON &

GAVIN,

Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed for Record May 12, 1945. [18]

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision

Civ. No. 210

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,
Defendant.

NOTICE OF REMOVAL AND FILING
OF RECORD IN FEDERAL COURT

To: Meryl Kirkevold, doing business as Barnes-
Woodin Fur Department, Plaintiff herein; and

To: Velikanje & Velikanje, attorneys for plaintiff:

You Are Hereby Ordered that heretofore and on
or about the 12th day of May, 1945 by an order of
the Superior Court of the State of Washington in
and for Yakima County the above entitled cause was
duly removed from said court to the District Court
of the United States for the Eastern District of
Washington, Southern Division, sitting at Yakima,
Washington, and a transcript of the record in said
cause was filed in said district court of the United
States for the Eastern District of Washington,
Southern Division, at Yakima, Washington; on the
1st day of June, 1945.

Dated this 1st day of June, 1945.

CHENEY, HUTCHESON &
GAVIN,

ELWOOD HUTCHESON,

Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 1, 1945. [19]

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.

Civ. No. 210

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,
Defendant,

CLARA HARBIN, MRS. WILLIAM McCLURE,
MABEL MILLER RAY, DOROTHY RIGGS,
and MABEL G. SMITH,

Additional Third-Party Defendants.

ORDER GRANTING MOTION TO ADD
ADDITIONAL PARTIES

This matter having duly and regularly come on
for hearing upon the motion of the defendant here-
in, Home Insurance Company of New York, a cor-

poration, to add additional parties and the granting of said motion having been agreed to by the plaintiff and defendant herein and the court being duly advised in the premises;

Now, Therefore, it is Hereby Ordered that Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, Mabel G. Smith, and Erma Turnell be and they are hereby added as additional third-party defendants herein, and the defendant is hereby permitted and granted leave to serve and file its answer and counter-claim herein.

Done in open court this 12th day of June, 1945.

L. B. SCHWELLENBACH,

Judge.

Presented by:

CHENEY, HUTCHESON &

GAVIN,

Attorneys for Defendant.

O. K.

VELIKANJE & VELIKANJE

Attorneys for Plaintiff.

[Endorsed]: Filed June 12, 1945. [20]

[Title of District Court and Cause.]

ANSWER AND COUNTER-CLAIM

Comes now the above named defendant and for its answer to the complaint of the plaintiff herein admits, denies, and alleges as follows:

FIRST DEFENSE

1. Defendant admits the allegations contained in paragraphs 1 and 2 of the complaint.

2. Answering paragraphs 3 and 5 thereof, defendant admits that in 1942 the defendant entered into a written contract with the plaintiff and issued to the plaintiff a fire insurance policy or contract termed Furriers-Customers Basic Policy, being policy number FC 1824, upon which there was an attached endorsement, admits that the defendant has a copy thereof, and that the same was in full force and effect at the of the fire hereinafter referred to, but denies each and every other allegation therein contained.

3. Answering paragraph 4, defendant denies each and every allegation therein contained. [21]

4. Answering paragraph 6, defendant admits that a loss by fire was sustained at plaintiff's said place of business on May 9, 1944, but denies each and every other allegation therein contained, and particularly denies that the amount of said fire loss was the sum therein stated or any other sum in excess of \$10,000.00; and defendant also particularly denies that said articles at the time of said loss were in the storage room of plaintiff.

5. Answering paragraph 7, defendant admits that on August 21, 1944, being within the extended time of filing proof of claim, the plaintiff filed a purported proof of loss with the defendant, and that defendant has the same in its possession, but denies each and every other allegation therein contained.

6. Answering paragraph 8, defendant admits that it issued certain certificate endorsements to some of the plaintiff's customers, admits that the customers named in said paragraph timely filed proof of loss with the defendant, and admits that the Lindsey, Rollis, and Evans fur coats were not lost or destroyed in said fire, but denies each and every other allegation therein contained, and particularly denies that the individuals therein named sustained a loss in the amounts therein stated, and denies that the total actual loss was in the amount therein alleged, or in any other sum in excess of \$10,000.00.

7. Answering paragraph 9, defendant admits that neither plaintiff nor defendant has made any settlement with the persons named in said paragraph, but denies each and every other allegation therein contained, and particularly denies that said persons sustained losses in the amounts therein stated, or in any other sum or at all.

8. Answering paragraph 10, defendant admits that it has paid to plaintiff by reason of said fire loss the sum of \$8200.00 and no more, but denies each and every other allegation therein contained,

and particularly denies that defendant is now indebted to plaintiff in the sum therein stated, or in any other sum or at all. [22]

SECOND DEFENSE

1. That said insurance policy, number FC 1824, issued by the defendant to the plaintiff referred to in the complaint herein, and particularly that certain portion thereof and rider attached thereto entitled "Furriers' Customers Custody Rider" being part of the said contract between the plaintiff and defendant herein sued upon, provided in part as follows:

"Furriers' Customers Custody Rider

"This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning or remodeling (and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property,) but excluding any stock belonging to the Assured or to any subsidiaries or affiliates of the Assured.

"This policy covers during transportation or otherwise while the property is in the custody or control of the Assured for alteration, repairing, cleaning, remodeling, or preparation for storage or for return to customers; and while in storage rooms, vaults or safes at locations hereinafter described.

"This Policy Insures:

"Against all risks of loss of or damage to the in-

sured property including the Assured's legal liability therefor, except as hereinafter provided * * *

"2. This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit of liability as stated below for the location at which such casualty occurs:

"Limits of Liability

"In storage rooms, vaults and safes: \$100,000.00.

Outside of storage rooms, vaults and safes: \$10,000.00.

Locations: at 301 E. Yakima Avenue, Yakima, Washington.

nor for more than \$5000.00 while at any other location not used by the Assured for storage, nor for more than \$5000.00 while in transit.

"3. It is warranted by the Assured that an accurate record will be kept of all receipts issued showing the customer's name, address and description and stipulated amount on each article included therein, which record shall be open for inspection by duly authorized representatives of this Company

at all reasonable times during the policy period and for one year thereafter." [23]

2. That said contract provides that defendant shall not be liable for more than the amount stipulated in the receipt issued by the plaintiff as applying to each respective article. That in numerous instances the amount claimed by the plaintiff in said so-called proof of loss is greatly in excess of the amount stipulated in the receipt issued by the plaintiff as applying to such respective articles; but the liability of the defendant is definitely limited by the contract in that respect.

3. That none of the fur coats or other articles situated in the storage room, vault, and safe of the plaintiff at his said place of business at 301 East Yakima Avenue, in Yakima, Washington, were lost or damaged in any respect by reason of said fire which occurred there on May 9, 1944, referred to in the complaint herein. That all of the fur coats and other articles which were lost or damaged in said fire were then located outside of storage room, vault, and safe of the plaintiff in said place of business. That by reason thereof the maximum liability of the defendant by reason of said fire cannot exceed in any event the maximum limit of \$10,000.00.

4. As stated in the complaint, the defendant has prior to the commencement of this action paid to plaintiff the sum of \$8200.00. Defendant was and is ready, able, and willing to pay the balance of said maximum limit up to \$10,000.00, to-wit, the sum of \$1800.00, but the same has not yet been paid be-

cause of uncertainty as to whom the same should be paid; that the plaintiff has not yet made settlement with all of the owners of fur coats and other articles which are alleged to have been destroyed or damaged by said fire. Defendant is ready, able, and willing to pay said remaining sum of \$1800.00 to whomsoever the court shall adjudge herein is entitled thereto. [24]

COUNTER-CLAIM FOR INTERPLEADER

1. Defendant repeats and incorporates by reference herein and makes a part hereof all of the allegations of paragraphs 1, 2, 3, and 4 of the foregoing second defense of the defendant in this answer, the same as though fully set forth herein.

2. That defendant is at this time filing a motion asking the court to enter an order making Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith additional third-party defendants herein. Said persons and each of them were and are citizens and residents of the State of Washington, and not of the State of New York. Defendant is a corporation organized and existing under the laws of the State of New York and is a citizen and resident of the said State of New York and not of the State of Washington.

3. Said additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith were the owners of fur coats and other articles which are alleged to have been damaged by said fire on May 9, 1944 at

the plaintiff's place of business at 301 East Yakima Avenue, in Yakima, Washington. No settlement has been made with said persons by either the plaintiff or the defendant herein.

4. Each of said additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith, and the plaintiff herein are claiming to be entitled to receive payment from the defendant under said policy and have made demand for payment thereof. By reason of these conflicting claims of the said parties, defendant is in great doubt as to which of said parties is entitled to be paid the remaining balance of the amount of the said policy in the said sum of \$1800.00. The defendant is thereby exposed to double or multiple liability to said parties or their [25] assigns. The defendant is not liable to any or all of the said claimants for any sum in excess of the remaining balance of \$1800.00. Said additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith, and each of them reside in Yakima County, and within the Eastern District of Washington, Southern Division of the above entitled court, and the presence of said parties is necessary and required for the granting of complete relief in the determination of this counter-claim for interpleader of the defendant herein. Defendant has no plain, speedy, and adequate remedy at law.

Wherefore, defendant demands and prays for judgment and decree of this court as follows:

(1) That the plaintiff is not entitled to recover herein, and that the complaint of the plaintiff herein be dismissed with prejudice.

(2) That the liability, if any, of the defendant herein be limited in accordance with the provisions of said insurance contract hereinabove quoted, namely, limited as to each respective article to the amount stipulated in the receipt issued by the plaintiff and further limited so as not to exceed the total maximum sum of \$1800.00 to the plaintiff and all other persons whomsoever by reason of said fire in addition to the sum of \$8200.00 heretofore paid by defendant to plaintiff.

(3) That said additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith be added as additional parties herein by order of the court and that said additional parties and the plaintiff herein be required to interplead and settle between themselves their rights to the money due under said policy, if any, and that defendant be discharged from all liability in the premises except the sum of \$1800.00 to such person or persons whom the court shall adjudge are entitled thereto. [26]

(4) That said additional third-party defendants and each of them and all persons claiming or who may hereafter claim by, through, and under them by reason of assignment from them or otherwise, be permanently restrained and enjoined from instituting or prosecuting any claim or action against the defendant herein for the recovery of the amount

of said policy or any part thereof, or for any recovery whatsoever by reason of said fire, or any damage sustained thereby.

(5) That defendant have and recover judgment against the plaintiff for its costs and disbursements herein to be taxed.

(6) Defendant prays for such other further relief as to this honorable court may seem just and equitable in the premises.

CHENEY, HUTCHESON &
GAVIN,
/s/ ELWOOD HUTCHESON,
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 1, 1945. [27]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff in the above-entitled action and in reply to the Answer and Counter-Claim of the defendant herein admits, denies and alleges, as follows:

1.

Plaintiff admits all of the paragraphs of defendant's first defense, except such allegations as are contrary to plaintiff's complaint and are repugnant thereto.

2.

Plaintiff admits paragraph 1 of defendant's second defense.

3.

Plaintiff denies paragraph 2 and 3 of defendant's second defense.

4.

Plaintiff admits that defendant, prior to the commencement of this action, paid the plaintiff the sum of \$8,200.00, but denies the rest and remainder of said paragraph 4 of defendant's second defense.

5.

Plaintiff admits the reference to paragraph 1 of the second [28] defense, but denies the rest and remainder of paragraph 1 of defendant's counter-claim for interpleader.

6.

Plaintiff denies the rest and remainder of defendant's counter-claim for interpleader, and specifically denies that the third party defendants therein named are entitled to any part or portion of any sums of money coming to or belonging to the plaintiff herein under said insurance policy, and specifically alleges that if said third party defendants are entitled to any sums whatsoever said sums of money are in an amount over and in excess of any amount prayed for by said plaintiff.

Wherefore, Plaintiff prays that judgment be entered in conformity with its complaint now on file and of record herein.

That having fully answered the Answer and Counter-Claim of the defendant, that the same be dismissed and held for naught and for such other and further relief as to this honorable court may seem just and equitable in the premises.

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff.

Service Accepted and Copy Received this 25th day of June, 1945.

/s/ CHENEY, HUTCHESON &
GAVIN,
Attorneys for Defendant.

[Endorsed]: Filed June 25, 1945. [29]

[Title of District Court and Cause.]

DEFAULT JUDGMENT AS TO ADDITIONAL
THIRD-PARTY DEFENDANTS

The above entitled cause coming on for hearing in open court this 31st day of August, 1945, upon the motion and affidavit of defendant for an order adjudging the additional third-party defendants hereinafter named to be in default for want of an appearance in said action and upon all the files and records herein, defendant appearing by Cheney, Hutcheson & Gavin and Elwood Hutcheson, attorneys of record, plaintiff appearing by E. F. Velikanje, one of his attorneys of record, Dorothy Riggs, additional third-party defendant, having served upon plaintiff and defendant herein a notar-

ized letter in answer to the summons and complaint and answer and counter-claim, which said letter was ordered filed herein by the court and ruled by the court to constitute an appearance and claim by said Dorothy Riggs, per se, and the other additional third-party defendants not appearing either in person or by anyone in their behalf, and it appearing to the court that these other said additional third-party defendants have been duly and personally served with summons and complaint of the plaintiff and answer and counter-claim of the defendant, and that more than sixty days have elapsed since the date of such service upon said additional third-party defendants, and the court being fully advised in the premises, it is hereby [30]

Ordered, Adjudged and Decreed that the additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Mabel G. Smith Coffin, whose name was formerly Mabel G. Smith, and Erma Turnell be and they are hereby adjudged to be in default in this action, and it is hereby

Ordered, Adjudged and Decreed that none of said additional third-party defendants herein has any right, title, claim, or interest whatever in or to the funds involved herein or the proceeds of the insurance policy involved and referred to in the pleadings on file herein, and it is hereby

Ordered, Adjudged and Decreed that the letter of Dorothy Riggs, an additional third-party defendant, ordered filed herein, constitutes an appearance

and claim by said Dorothy Riggs, per se, and the motion for default as to said Dorothy Riggs is denied and counsel for defendant are ordered to advise her of this order of the court.

Done in open court this 31st day of August, 1945.

CHARLES H. LEAVY,
District Judge.

Presented by:

CHENEY, HUTCHESON &
GAVIN,
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 1, 1945. [31]

[Title of District Court and Cause.]

ADMISSION

Comes now the Home Insurance Company of New York, a corporation, the defendant herein, and in response to the request for admission dated September 24, 1945, served and filed by the plaintiff herein, pursuant to Rule 36 of the Federal Rules of Civil Procedure, said defendant hereby admits the genuineness and validity of the releases and assignments attached thereto and served upon the undersigned therewith; and said defendant states that it will make no contention herein that the said releases and assignments do not contain genuine signatures.

Dated at Yakima, Washington this 28th day of September, 1945.

CHENEY, HUTCHESON &
GAVIN,

/s/ ELWOOD HUTCHESON,

Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 29, 1945. [32]

[Title of District Court and Cause.]

ORDER RELATING TO PRE-TRIAL
HEARING

This matter having duly and regularly come on for hearing before the undersigned Judge of the above-entitled court on the 6th day of December, 1945, upon pre-trial hearing, plaintiff appearing by his attorneys, Velikanje & Velikanje, and the defendant appearing by its attorneys, Cheney, Hutcheson & Gavin; and the Court having held a pre-trial hearing;

It is, Now Here Ordered that as a result of said hearing that the issues be narrowed to the following questions:

1. As to the question of liability of the defendant, Home Insurance Company, under the terms

and conditions of the insurance policy, being a question of liability under the \$10,000.00 or the \$100,000.00 provision, to be determined by evidence and facts as to place of storage and interpretation of policy.

2. As to the liability of the defendant, Home Insurance Company, based upon individual "floater" policies; that is, as to whether said policies are under the policy limitations, if there are such limitations, or whether they are in addition thereto.

3. Actual amount of loss dependent upon value of coats destroyed [33] parties to be limited in proof of valuations by not to exceed three expert witnesses on each side, said number not to include the coat owners, who shall be allowed to testify in addition to experts.

4. Liability to Third-Party Defendant Dorothy Riggs and her claim in said action.

5. Question as to when interest would begin to run on any amount of recovery.

It is Further Ordered that there was included and admitted at said pre-trial hearing that the number of coats destroyed or damaged is approximately 149, being the coats listed in the Proof of Loss, less the following: Mrs. Earl Evans—\$125.00, L. C. Lindsey—\$375, Mrs. Harry Rollins—\$90.00, together with those persons made Third-party Defendants. That the Proof of Loss as made by plaintiff was sufficient. That no claim will be higher than the valuation set forth on the receipt issued to coat

owners, except in the case of those coats upon which there was a separate policy with the company.

Done in Open Court this 7th day of December, 1945.

/s/ CHARLES H. LEAVY,

District Judge.

Presented by:

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE,

Attorneys for Plaintiff.

O. K. as to Form:

CHENEY, HUTCHESON &

GAVIN,

/s/ ELWOOD HUTCHESON,

Attorneys for Defendant.

[Endorsed]: Filed Dec. 7, 1945. [34]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

Civ. No. 210

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,
Defendant,

CLARA HARBIN, MRS. WILLIAM McCLURE,
MABEL MILLER RAY, DOROTHY RIGGS,
and MABEL G. SMITH, and ERMA TUR-
NELL,

Additional Third-Party Defendants.

TRANSCRIPT OF PROCEEDINGS.

Be it remembered that on the 7th day of March, 1946, at the hour of 2:00 o'clock p. m., the above entitled and numbered cause came on for trial before the Hon. Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Eastern District of Washington, Southern Division, at Yakima, Washington; the plaintiff appearing by his attorneys Velikanje & Velikanje (by Mr. Fred Velikanje), and the defendant Home Insurance Com-

pany appearing by its attorneys Cheney, Hutcheson & Gavin (by Mr. Hutcheson); and

Whereupon, the following proceedings were had and testimony given, to-wit: [37*]

The Court: Docket 210, Kirkevold versus Home Insurance Company. Are the parties ready?

Mr. Velikanje: Plaintiff is ready, Your Honor.

The Court: Now, I am somewhat familiar with this matter as I had some angles of it presented to me sometime here in December, I think it was.

Mr. Velikanje: That is correct.

The Court: And the issues then were substantially narrowed down to some five in number. Has anything occurred since that time that changes the matter in any way?

Mr. Velikanje: The only thing would be this; Your Honor, as to number four, Mr. Hutcheson advises that he received a letter from the third party defendant who advises she will not be here for trial, and make no appearance. Is that correct?

Mr. Hutcheson: That is correct, so I assume when it comes to entry of judgment, the default should be taken as to Dorothy Riggs, third party defendant. The default has been entered as to all third party defendants except her.

The Court: Yes. Very well, then you may proceed.

Mr. Velikanje: Does your Honor wish a sum-

* Page numbering appearing at foot of page of original Reporter's Transcript.

mary of the case, or are you familiar enough with the [38] pleadings.

The Court: I think I am familiar enough with it in a general way. The only question that I have in mind now is as to whether we might adopt some method of procedure whereby we can expedite the disposition of this matter.

We have here first a question of liability.

Mr. Velikanje: That is correct.

The Court: Now, is there some proof you desire to submit on that issue?

Mr. Velikanje: Yes, there will be. However, I might state this: Mr. Hutcheson, although we have not stipulated states that he does not plan to submit counter evidence as to value of these coats, so we have by that agreement shortened our—or will shorten our time necessary in that they will be proved by—quite definitely by the party interested, from his testimony.

The Court: And not by expert testimony?

Mr. Velikanje: Only so far as he himself and his brother is an expert, if it is necessary to put his brother on to substantiate values, but we have not brought in any outside experts by that agreement. Is that not correct, Mr. Hutcheson?

Mr. Hutcheson: Well, I don't know that there [38] is any agreement, but in substance that is correct.

The Court: Well, then, you may proceed.

Mr. Velikanje: I will call Meryl Kirkevold.

MERYL KIRKEVOLD

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

The Clerk: Your name is Meryl Kirkevold?

Witness: It is.

Q. Your name is Meryl Kirkevold?

A. Yes.

Q. And you are the plaintiff in this action?

A. I am.

Q. Mr. Kirkevold, for some years last past, you have been doing business as the Barnes-Woodin Fur Department?

A. That is correct.

Q. Located here in the City of Yakima?

A. Yes.

Q. The street number—do you know the street number of the Barnes-Woodin Company?

A. 301 East Yakima Avenue, I think.

Q. 301 East Yakima Avenue? [40]

A. I think it is, yes.

Q. Mr. Kirkevold, I hand you Plaintiff's identification number 1. What is that?

A. That was the insurance policy on customer's goods, insurance policy.

Q. A policy that you had taken out?

A. Yes, sir.

Q. What firm did you take that out for?

A. That is the Home Insurance Company.

(Testimony of Meryl Kirkevold.)

Q. What? A. Hargreaves & Orkney.

Q. That is a local insurance agency?

A. Yes, sir.

Mr. Velikanje: We offer in evidence this.

Mr. Hutcheson: No objection. Of course, there is one rider there which was attached subsequently. That is correct, isn't it?

Mr. Velikanje: That is correct. The rider is effective June 4th, 1944.

Mr. Hutcheson: With that understanding we have no objection.

The Court: It will be admitted in evidence.

The Clerk: Plaintiff's Exhibit 1.

(Whereupon, insurance policy referred to was received in evidence and marked Plaintiff's Exhibit 1.) [41]

PLAINTIFF'S EXHIBIT No. 1

(Cover Page)

Furriers' Customers Basic Policy

Expires: Continuous Until Cancelled

Name of Assured: Barnes-Woodin Fur Dept.

Amount: \$ Open. Premium, (Deposit) \$50.00

No. FC-1824

The Home Insurance Company—New York

[Sticker]: Northwestern Mutual Fire Association,
Northwest Casualty Company. Hargreaves & Ork-

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

ney, 503 Miller Building, Yakima, Washington. Telephone 6011.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

(Face of Policy)

FURRIERS' CUSTOMERS BASIC POLICY

No. FC-1824

Stock Company

THE HOME INSURANCE COMPANY
NEW YORK

Organized 1853

Deposit Premium \$50.00

In consideration of the stipulations named herein, does insure Meryl Kirkevold dba Barnes-Woodin Fur Dept., hereinafter called the Assured, whose address is 301 E. Yakima Avenue, Yakima, Washington, for his (their) account and for account of customers hereinafter described,

From the 17th day of August, 1942, at Noon, Standard Time at place of issuance, until cancelled as herein provided.

(Attach Rider)

FURRIERS' CUSTOMERS CERTIFICATION
ENDORSEMENT

1. This policy is extended to cover during trans-

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

portation or otherwise such Furs or garments trimmed with Fur, the property of customers, for which the Assured has a Certification of Insurance, on form approved by this Company. No Certification of Insurance issued shall cover beyond the time the ownership remains vested in the person to whom issued, nor shall any Certification be issued for a period longer than twelve (12) months from the date of issuance.

2. It is agreed by the Assured that Certifications of Insurance shall be issued only in combination with annual storage agreements at a combined storage and insurance charge, and that the rate and premium applying to this insurance shall not be stipulated as such on any Certification, bill, circular or advertising matter.

3. The additional premium for the insurance granted by this endorsement shall be computed at the rate of Fifty (50c) cents per \$100 per annum of the amount stipulated on each Certification issued. Such additional premium to be paid monthly on or before the 15th day of the month following the issuance of such Certifications.

4. The Assured agrees to forward to this Company or its Agent at the close of each business day copies of all Certifications issued.

5. The cancellation of this policy shall not affect any risk then pending under Certifications issued by the Assured as herein provided. It is understood

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

and agreed that any one or all Certifications may be cancelled at any time by the Company, giving five (5) days' written notice thereof, mailed to the address of the person to whom issued as stated in the Certification, the unearned portion of paid premium to be returned to the Assured.

Subject to all terms, conditions and warranties of the policy and its rider to which this endorsement is attached.

Attaching to and forming part of Policy No. FC 1924 of the Home Insurance Company.

Dated September 1, 1942.

THE HOME INSURANCE CO.

By /s/ JAMES E. MOORE,
Agent.

FURRIERS' CUSTOMERS CUSTODY RIDER

This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alterations, repairing, cleaning or remodeling and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property, but excluding any stock belonging to the Assured or to any subsidiaries or affiliates of the Assured.

This policy covers during transportation or otherwise while the property is in the custody or control

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)
of the Assured for alteration, repairing, cleaning, remodeling, or preparation for storage or for return to customers; and while in storage rooms, vaults or safes at locations hereinafter described.

This Policy Insures:

Against all risks of loss of or damage to the insured property including the Assured's legal liability therefor, except as hereinafter provided.

**This Policy Does Not Cover the Insured Property
or the Assured's Legal Liability for:**

(a) Loss or damage occasioned by gradual deterioration, moth, vermin, inherent vice; or damage sustained due to any process or while actually being worked upon and resulting therefrom unless caused by fire;

(b) Loss or damage occasioned by war, invasion, hostilities, rebellion, insurrection, confiscation by order of any Government or Public Authority, or risks of contraband or illegal transportation or trade.

1. Warranted that the Assured shall use due diligence to maintain during the period of this policy such protective safeguards as are indicated in the proposal for this policy.

2. This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article,

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit of liability as stated below for the location at which such casualty occurs:

Limits of Liability

In storage rooms, vaults and safes: \$100,000.00.

Outside of storage rooms, vaults and safes, \$10,000.00.

Location: 301 E. Yakima Avenue, Yakima, Washington.

nor for more \$5,000.00 while at any other location not used by the Assured for storage, nor for more than \$5,000.00 while in transit.

3. It is warranted by the Assured that an accurate record will be kept of all receipts issued showing the customer's name, address and description and stipulated amount on each article included therein, which record shall be open for inspection by duly authorized representatives of this Company at all reasonable times during the policy period and for one year thereafter.

4. The Assured agrees to report to this Company not later than the fifteenth day of every month the total amount at risk hereunder on the last day of the

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

preceding month and to pay premium thereon at the rates herein provided. A deposit premium of \$50.00 is due and payable on the date hereof and annually thereafter, and all monthly premiums shall be charged against this deposit premium until such time as it shall have been earned by this Company, after which time the additional monthly premium shall be due and payable on the date reports are made by the Assured as herein required.

5. The premium for this insurance shall be computed at the following monthly rate(s): .1009c per \$100.00 of the amount at risk.

6. Any loss, at the option of this Company, may be paid to the Assured, or adjusted with and paid to the Assured's customer or to the owner of the property.

7. The Assured warrants that no certifications, certificates or policies of insurance covering the property insured hereunder will be issued by or through the Assured other than this Company, as authorized under the terms of this policy when so endorsed.

8. This policy is deemed continuous, but it may be cancelled at any time by the Assured; or it may be cancelled by the Company on fifteen (15) days' written notice thereof mailed to the Assured. If this policy shall be cancelled or become void or cease, the deposit premium having been paid, the balance of

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

the deposit premium not yet earned shall be returned to the Assured.

Subject to all terms, conditions and warranties of the policy to which this rider is attached.

Attached to and forming part of Policy No. FC 1824 of the Home Insurance Company, issued to Barnes-Woodin Fur Dept., at its Seattle, Washington Agency.

Date of Endorsement: September 1, 1942.

THE HOME INSURANCE CO.

By /s/ JAMES E. MOORE,

Agent.

This Policy is Made and Accepted Subject to the Foregoing Stipulations and Conditions and to the Conditions Printed on the Back Hereof, Which Are Hereby Specially Referred to and Made a Part of This Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

In Witness Whereof, this Company has executed

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

and attested these presents, but this policy shall not be valid unless countersigned by a duly authorized Agent of the Company.

/s/ W. KURTH,
President.

/s/ W. BEYER,
Secretary.

Countersigned at Seattle, Washington, this 1st day of September, 1942.

THE HOME INSURANCE CO.

By /s/ JAMES E. MOORE,
Agent.

GENERAL CONDITIONS

1. It is warranted by the Assured that this insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

2. If there is any other insurance covering this property insured hereunder, whether prior, subsequent to, or simultaneous with this insurance, which in the absence of this insurance would cover the loss or damage hereby covered, then this Company shall not be liable hereunder for more than the excess over and above such other insurance. This clause, however, shall not apply to insurance effected by a customer or a member of the family of a customer of the Assured, and the existence of such insurance, or payment of a loss thereunder, shall not constitute

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

a defense to any claim otherwise payable under this policy, nor shall such insurance be called on to contribute to any loss payable hereunder.

3. The Assured shall immediately report to this Company or its Agent every loss or damage which may become a claim under this policy, and also shall file with this Company or its Agent within ninety (90) days from date of loss, a detailed sworn proof of loss. Failure by the Assured to report the said loss or damage and to file such written proofs of loss as herein provided, shall invalidate any claim under this policy.

4. In case of loss or damage it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance; nor shall the acts of the Assured or this Company in recovering, saving and preserving the property insured in case of loss or damage, be considered a waiver or an acceptance of abandonment; to the charge whereof, this Company will contribute according to the rate and quantity of the sum herein insured.

5. The Assured shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of the household and employees to submit, to examinations under oath by any persons named by the Company,

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

relative to any and all matters in connection with a claim, and shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made.

6. All adjusted claims shall be paid or made good within thirty (30) days after presentation and acceptance of satisfactory proofs of interest and loss at the office of this Company. No loss shall be paid hereunder if the Assured has collected the same from others.

7. It is a condition of this policy that no suit, action or proceeding for the recovery of any claim under this policy shall be maintainable in any court unless the same be commenced within twelve (12) months next after the calendar date of the happening of the physical loss or damage out of which the said claim arose. Provided, however, that if by the laws of the state within which this policy is issued such limitation is invalid, then any such claim shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted, by the laws of such state, to be fixed herein.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

[Stamped]: Please Attach to Policy

Furriers' Customers Policy

Effective: June 24, 1944—In consideration of the premium charged, it is hereby understood and agreed that the limits of Liability applicable to customers' goods "In storage rooms, vaults and safes" is increased to \$125,000, and the limit applicable to customers' goods "outside of storage rooms, vaults and safes" is increased to \$20,000.

All other terms and conditions of this policy remain unchanged.

Attached to and forms part of Policy No. FC 1824 of Home Insurance Company, issued to Barnes-Woodin Fur Dept. Dated at Seattle, Washington, June 30, 1944.

HARGREAVES & ORKNEY,

By /s/ J. W. ORKNEY.

Furriers Customers

A.P. \$41.22

Due to an adjustment under this policy an additional premium of \$41.22 is hereby charged the Assured based on the following computation:

Earned premium for the period August 17th	
to August 31, 1943	\$ 91.22
Less Deposit Premium	50.00
	<hr/>
Additional Premium	\$ 41.22

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

All other terms and conditions of this policy remain unchanged.

Attached to and forms part of Policy No. FC 1824 of Home, issued to Barnes Woodin Fur Dept. Dated at San Francisco, California, Dec. 28, 1943.

NEWHOUSE AND SAYRE., INC.

By /s/ L. J. HOAGLAND K

Furriers Customers

A.P. \$116.92

Values at Risk:

September, 1943	\$ 75,500.00	@ .1008	\$ 76.10
October	40,500.00	@ .1008	40.82
	<hr/>		<hr/>
	\$116,000.00		\$116.92

All other terms and conditions of this policy remain unchanged.

Attached to and forms part of Policy No. FC 1824 of Home, issued to Barnes-Woodin Fur Dept. Dated at San Francisco, California, December 28, 1943.

NEWHOUSE AND SAYRE, INC.,

By /s/ L. J. HOAGLAND. K

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

Furriers Customers

A.P. \$10.58

Values at Risk—November, 1943

\$10,500.00 @ .1008 \$10.58

All other terms, limits and conditions of this policy remaining unchanged.

This slip is attached to and forms part of Policy No. F.C. 1824 of the Home Insurance Company, issued to Barnes-Woodin Fur Dept. Dated at San Francisco, California, May 22, 1944.

NEWHOUSE AND SAYRE, INC.,

By /s/ L. J. HOAGLAND. K

Q. Mr. Kirkevold, did the Barnes-Woodin Company have a fire? A. Yes, they did.

Q. Do you know the date?

A. Well, it was on May the 9th, 1944, at approximately 5:30 in the evening, or a few minutes thereafter—something like that.

Q. Did you have coats destroyed? A. Yes.

Q. Some that you owned yourself? A. Yes.

Q. And did you also have customers coats destroyed? A. Yes.

Q. Pursuant to said loss of coats, did you file a proof of loss with the Home Insurance Company?

A. I did.

(Testimony of Meryl Kirkevold.)

Q. I hand you Plaintiff's identification 2. Is that the proof of loss you filed, or a copy of it?

A. Yes, it is.

Mr. Velikanje: We offer it in evidence.

Mr. Hutcheson: No objection.

The Court: It will be admitted in evidence.

(Whereupon, proof of loss referred to, was then received in evidence and marked Plaintiff's Exhibit number 2.)

PLAINTIFF'S EXHIBIT No. 2

PROOF OF LOSS

To: The Home Insurance Company of New York.
Policy No. FC-1824.

By the above-named policy of insurance you insured Meryl Kirkevold, d.b.a. Barnes-Woodin Fur Dept., against loss or damage upon the property described as Furriers' Customers Certification Endorsement and Furriers' Customers Custody Rider, according to the terms and conditions of the said policy and all forms, endorsements, transfers and assignments attached thereto.

On the 9th day of May, 1944, about the hour of 5:30 p.m., a loss was sustained which, to the best of my knowledge and belief, was a fire believed to be the result of defective wiring in the building. That at the time of the loss, or damage, the said property was located at the Barnes-Woodin Fur Department at 301 East Yakima Avenue, Yakima, Washington,

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

and was in the custody of Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, and belonged to customers, the same having been left in the care and custody of said department for storage and/or repairs.

That the interest protected by this policy and for which claim is made, is that of Bailee. Since the said policy was issued, there has been no assignment thereof, or change of ownership, use, possession, designation or exposure of the property described or of your insured's interest therein. That the loss as suffered is set forth under an itemized statement attached hereto and referred to as "Exhibit A", being a list of customers, item destroyed, value and indication whether in storage or held for repairs; That all items marked "O.P." are covered under Furriers' Customers Certification Endorsement; that the items marked "Ins." are to the best belief insured under a Floater Policy in addition to the policy herein; that the values as set forth in said Exhibit are the actual values of the item destroyed or else amount of designated value.

That there is also attached to said Proof of Loss "Exhibit B", being extension of time granted for filing Proof of Loss under policy.

You are hereby requested and authorized to make payment to Meryl Kirkevold, and in consideration of such payment said Company will forever be discharged from all further claim by reason of said

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

loss and damage, leaving Seventy Thousand Two Hundred Fifteen Dollars (\$70,215.00), only in force under said policy.

In consideration of the payment of this sum the insured will subrogate the Company to the amount of such payment to all rights of recovery for such loss or expense, and the insured further agrees upon demand to execute all documents required and to cooperate with the Company in prosecuting all actions to effect such recovery, and the Company is hereby authorized to commence and prosecute any necessary action or proceedings in the name of the insured or the company or of any person or persons to whom the Company may assign its claim hereunder for the purpose of effecting collection of the amount above mentioned.

The insured further agrees to notify the Company in case of any recovery of the property for which claim is being made hereunder, and agrees to turn over to the Company any such recovery which may be made or reimburse the Company to the extent of the payment for such property which may be recovered.

The said loss did not originate by any act, design or procurement on part of insured, nor on the part of anyone having any interest in the property insured, or in the said Policy of Insurance; nor in consequence of any fraud or evil practice done or suffered by said insured; that nothing has been done

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

by or with privity or consent of insured to violate the conditions of the Policy, or to render it void; and that no articles are mentioned herein or in attached schedules but such as were in the building damaged or destroyed, and belonging to and in the possession of the said insured at the time of the said loss; that no property saved has been in any manner concealed, and that no attempt to deceive the said Company as to the extent of said loss or otherwise has in any manner been made. Any other information that may be required will be furnished on call and considered a portion of these proofs.

It is further understood and agreed that all bills, invoices, schedules and statements made by the insured and attached to this Proof of Loss are to be incorporated into this proof, and are hereby duly sworn to and made a part hereof.

Dated at Yakima, Washington, this 18th day of August, 1944.

/s/ MERYL W. KIRKEVOLD,
Insured.

Subscribed and Sworn to before me this 18th day of August, 1944.

[Seal] /s/ FREDERICK VELIKANJE,
Notary Public in and for the State of Washington,
residing at Yakima.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

EXHIBIT "A"

Value	Owner	Item	
75.00	Albrecht, Mrs. Earnest	Brown Lapin	Rej
150.00	Andrews, Mable	Sealine	S
180.00	Arteel, Mrs. W. J.	Marmot	S
100.00	Babcock, Mrs. Ralph	Grey Squirrel Locke	S
75.00	Bair, Mrs. Howard	Coney	Rej
281.67*	325.00 Balke, Mrs. Emma	Squirrel Locke	Rej
	200.00 Basey, Mrs. Grace	Black Caracul	S
	200.00 Baur, Hattie	Caracul	S
	100.00 Beauchene, Mrs. J. A.	Black Caracul	Rej
	200.00 Beerman, Mrs. W. H.	O.P. Canadian Squirrel	S
	200.00 Belaire, Mrs. Victor	Ins. Canadian Squirrel	S
	200.00 Bell, Doris Benoit	Beaver	S
	200.00 Bitter, Mrs. Gregory	O.P. Northern Muskrat Black	S
	200.00 Bloxom, Mrs. Merritt	Ins. Northern Muskrat Belly	S
	150.00 Bobst, Mrs. Mae	Brown Coney	S
	150.00 Bodine, Florence	Black Caracul	S
	200.00 Brimmer, H. V.	Brown Squirrel Locke	S
	185.00 Brown, Mrs. Fred F.	Brown Squirrel Locke	S
	Bayson [Pencilled]		
	125.00 Burke, Barbara G.	Southern Muskrat Back	S
	200.00 Busby, Mrs. Thomas	Grey Kid Caracul	S
	200.00 Buttker, W. H.	Northern Muskrat Back	S
	150.00 Campbell, Helen	Ins. Grey Persian Paw	S
	150.00 Carman, Mrs. Rex	Black Pony	S
	150.00 Cast, Mrs. Harold	Sealine	Rej
	150.00 Chadwick, R. E.	Hudson Seal	S
	100.00 Chance, May	Persian Paw	S
	150.00 Clarke, Glen L.	Silver Muskrat	S
	150.00 Clements, James	Cloth coat—Fox collar	Re
	250.00 Conkey, A. L.	Brown Squirrel Locke	S
	100.00 Cox, Alice	Brown Coney	S
	200.00 Cronholm, Mrs. A. L.	Northern Muskrat Belly	S
	200.00 Dasdice, J. A.	Squirrel Locke	S
	500.00 Dawson, Mrs. F. C.	Red Fox Stroller	S
	100.00 Dawson, Mrs. F. C.	Black Caracul	S
	150.00 Densmore, Mrs. W.	Brown Cheek Lamb	S

* Figures pencilled in margin.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

Value	Owner		Item	
150.00	Dewar, Gladys N.		Natural Muskrat	St.
200.00	Dormaier, C. C.		Pechaniki	St.
200.00	Draper, Wm. C.		Black Persian Paw	St.
50.00	Edwards, Mrs. Floyd C.		Brown Coney	St.
200.00	Erickson, O. H.	Ins.	Northern Muskrat Back	St.
0.00*	150.00 Eschback, Mrs. Ed.		Sealine	Rep.
200.00	Etl, Lillian		Northern Muskrat Back	St.
125.00	Evans, Mrs. Earl		Sealine	St.
200.00	Eyman, Mrs. Chas.		Hudson Seal	St.
200.00	Fetherstone, Mrs. J. E.		Brown Squirrel Locke	St.
50.00	Fiebelkom, Hazel		Child's Lapin	Rep.
250.00	Flater, Mrs. Mabel		Hudson Seal	St.
200.00	Fleming, Mrs. Del	Ins.	Black Alaska Seal	St.
100.00	Fleming, Mrs. Del		Natural Silver Muskrat	St.
300.00	Foran, Ruth		Leopard	St.
200.00	Fortier, Mrs. Geo.	O.P.	Northern Muskrat Back	St.
150.00	Fox, Mrs. H. R.		Black Caracul	St.
200.00	Fraser, Mrs. Ronald		Grey Persian Lamb	St.
150.00	Fuqua, A. E.		Black Pony	St.
150.00	Gannon, Gertrude		Sealine	St.
	out Gaudette, Pauline		Grey Caracul	Rep.
150.00	Golty, W.		Hudson Seal	St.
150.00	Griffeth		Marmot	St.
375.00	Hagne, Harold J.		Natural Muskrat	Rep.
100.00	Hall, Angeline		Black Caracul	Rep.
175.00	Hamilton, J. C.		Muskrat Northern Belly	St.
350.00	Hanratty		Brown Russian Squirrel	Rep.
200.00	Harbin, Clara	Ins.	Southern Muskrat Back	St.
5.00*	300.00 Harnden, W. G.		Black Chek. Lamb	Rep.
150.00	Hartman, Dean		Brown Pony	St.
200.00	Hayes, C. P.		Northern Muskrat	St.
200.00	Hawk, C.		1 pair Silver Foxes	St.
150.00	Herrette		Squirrel Locke	St.
200.00	Hillmer, Beatrice	O.P.	Marmot	St.
200.00	Holtzinger, C. R.		Russian Squirrel	St.
75.00	Hornsberger, A.		Black Coney	Rep.
180.00	Jarvis, Helen		Squirrel Locke	St.
150.00	Johnson, Fred E.		Cloth coat—Fox collar	St.

* Figures pencilled in margin.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

Value	Owner		Item	
	140.00 Jahr, Edna C.		Grey Chek. Lamb	
350.00*	375.00 Jones, M. W.	O.P.	Northern Muskrat Back	
	100.00 Junker, Elizabeth		Brown Coney Flank	
	200.00 Kinney, C. H.		Brown Squirrel Locke	
	225.00 Kiou, Mrs. Vernon		Black Pony	
	200.00 Knight, Ida		Hudson Seal	
	200.00 Krause, Mary Alice	O.P.	Natural Opossum	
	200.00 Leach, E. E.	O.P.	Northern Muskrat	
	375.00 Lindsey, L. C.		Muskrat	R
	200.00 Lisle, Ivan B.		Brown Caracul	
	500.00 Logozzo, Elsie	O.P.	Canadian Squirrel	
	200.00 Lowenthal, Carl	O.P.	Northern Muskrat Back	
	150.00 Lyon, W. F.		Grey Chek. Lamb	
	125.00 Mace, Clark		Black Pony	
	100.00 Magee, Patricis		Skunk Opossum	
	200.00 Martinez, M. J.		Muskrat	
	30.00 McClure, Mrs. Wm.	Ins.	2 Marten skins	
	150.00 McLure, Mrs. Wm.	Ins.	Muskrat Southern Back	
	200.00 McCorkindale, Elaine	O.P.	Natural Muskrat	
	200.00 McGilvery, G. F.	Ins.	Natural Russian Squirrel	
	200.00 Meek, Eleanor		Muskrat Northern Back	
	200.00 Mercke, J. W.		Persian Lamb	
	200.00 Messer, Lucille H.		Grey Caracul	
	600.00 Metyger, Bee		Hudson Seal	R
	300.00 Miller, H. R.		Muskrat, Southern Back	
	75.00 Mixon, Betty		Red Fox Jacket	
	100.00 Mixon, Louise		Russian Squirrel Brown	
	150.00 Moore, J. D.		Sealine	R
	325.00 Morrill, Florence		Peschaniki	R
150.00*	200.00 Marse, Mrs. Opal		Skunk	
	100.00 Munsil, L. W.		Black Caracul	
	150.00 Nelson, Mrs. Elmer		Black Chek. Lamb	
	600.00 Odell, Harry		Hudson Seal	F
75.00*	100.00 Orth, J. E.		Pale Red Fox Skin	F
	400.00 Palmer, F. C.		Alaska Seal Coat	
	100.00 Palmer, F. C.		2 collars & Hud. Seal Cape	
	135.00 Patnode, Mrs. Mose		Beaverette	

* Figures pencilled in margin.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

Value	Owner		Item	
200.00	Peterson, Laura		Squirrel Paw	St.
100.00	Pollard, H. E.		Sealine	St.
150.00	Poulter, Merle		Black Caracul	St.
100.00	Pulos, Ada		Brown Coney	St.
200.00	Ray, Mabel Miller	Ins.	Man's Muskrat	St.
200.00	Reich, Mrs. Wm.		Marmot	St.
200.00	Reischl, Irene		Muskrat Northern Belly	St.
200.00	Richards, Gordon		Northern Muskrat Back	St.
350.00	Riggs, Dorothy	Ins.	Brown Squirrel Locke	Rep.
200.00	Ritchie, Clarence		Northern Muskrat Back	St.
75.00	Robinson, K. G.		Beaverette	St.
90.00	Rollis, Mrs. Harry		Guanaco Jacket	St.
200.00	Ross, Nan		Northern Muskrat Belly	St.
200.00	Ryker, Rodney		Black Chek. Lamb	St.
200.00	Schmidt, G. A.		Natural Muskrat & Hat	St.
200.00	Schmidt, Rudy		Muekrat Southern Back	St.
200.00	Schoonover, Jack		Weasel	St.
75.00	Shaw, Verda Gayle		Opossum Jacket	St.
200.00	Shirran, W. C.		Hudson Seal	St.
150.00	Smith, Mabel G.	Ins.	Hudson Seal	St.
31.67*	Souther, Frank		Squirrel Locke	Rep.
200.00	Spinner, H. R.	Ins.	Brown Alaska Seal	St.
200.00	{ Stanley, Dorteia	O.P.	Ermine	St.
	{ Stanley, Dorteia	O.P.	5 Kolmoky Skins	St.
150.00	Stanley, Gladys		Natural Muskrat So. Back	St.
100.00	Stoltenow, B. W.		Brown Coney	St.
350.00	Stuart, Agnes M.	Ins.	Black Chek. Lamb	Rep.
250.00	Stumpf, John H.		Baby Seal	St.
100.00	Taliaferro, Thelma		Brown Chek.	St.
200.00	Thacker, Cecil		Pechanki	St.
100.00	Thomas, David G.		Brown Squirrel Locke	St.
200.00	Thomas, Elmer		Black Caracul	St.
200.00	Thompson, J. C.		Northern Muskrat Back	St.
5.00*	170.00 Tilton, Mrs. Rex		4 Marten Skins	Rep.
	200.00 Timpke, Glen D.		Marmot	St.
	200.00 Turnell, Erma	Ins.	Persian Lamb Black	St.
	350.00 Verd, Mrs. Chas.		Northern Muskrat Belly	Rep.

* Figures pencilled in margin.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

Value	Owner	Item
150.00	Vivian, James	Sealine
225.00	Wait, Carlyle	Pony
200.00	Walsh, C. J.	Canadian Squirrel
250.00	Warner, A. K.	Ins. Muskrat
200.00	Warner, Harold	Brown Squirrel Locke V
200.00	Wiehl, Wright	Grey Squirrel Locke
150.00	Williams, D. A.	Black Caracul
200.00	Wilson, Ed.	Hudson Seal
100.00	Wright, Delbert	Sealine
350.00	York, Paul F.	Muskrat
200.00	Bryon, Irene	O.P. Grey Squirrel Paw

 29,785.00

EXHIBIT "B"

Fire Companies' Adjustment Bureau, Inc.

Refer to File No. YAK-4-452-M August 2, 1944

Mr. Meryl W. Kirkevold,
 c/o Velikanje & Velikanje,
 Miller Bldg, Yakima, Wash.

Dear Sir:

Without at this time either admitting or denying liability of waiving any of its other rights and defenses under all of the terms and conditions of its Policy No. FC 1824 issued in the name of Meryl Kirkevold, d.b.a. Barnes-Woodin Fur Department, the Home Insurance Company of New York hereby extend the time for filing a detailed sworn proof of loss, as provided in Par. 3, General Conditions of said Policy No. FC 1824, for any alleged claim that may have been occasioned by reason of fire that oc-

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

curred May 9th, 1944, from 90 days from date of said fire, to September 10th, 1944.

This letter refers specifically to the extension of time for filing said detailed sworn proof of loss as required by Paragraph 2, General Conditions of said Policy No. FC 1824. It is sent you, without any waiver of any right or defenses the said Home Insurance Company may hereafter accrue to it under all other provisions of said Policy No. FC 1824, or under the Statutes of the State of Washington or under the Common Law. Such rights and defenses being hereby specifically reserved.

Yours very truly,

L. M. McKINLEY,

Adjusting Representative for the Home Insurance
Co. of New York.

LMM/a—c-SF—c-Co.

Q. Mr. Kirkevold, pursuant to—attached to the proof of [42] loss is a list of the coats what were destroyed. Will you look this over, and I will refer to the individual ones on the coat losses.

Mr. Velikanje: If Your Honor please, we have here a box of receipts and things which we want to put in as one identification, but we will have to refer to the individual ones. I believe the best way would be to do it in that way. There may be

(Testimony of Meryl Kirkevold.)

some papers and things I may want to take out as we go along, but I want to submit these as one exhibit. I believe it is agreeable to Mr. Hutcheson.

Mr. Hutcheson: I have examined them, and I have no objection to their being offered in evidence.

The Court: They will be marked as one exhibit and admitted as such.

The Clerk: The plaintiff's Exhibit 3.

(Whereupon, receipts referred to was then received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Velikanje: Your Honor, I may state that it has been admitted that the assignments are all valid in these that we are now referring to in this identification, 3.

The Court: Yes.

The Clerk: Exhibit 3, that is admitted in evidence. [43]

Q. Mr. Kirkevold, you have before you Exhibit 2, the proof of loss with the schedule. On that proof of loss, the first coat that is listed, Mrs. Earnest Albrecht, on which you have a valuation of \$75.00. Was that coat destroyed?

A. Yes, it was.

Q. I hand you a portion of Exhibit 3, and would like to have you look at that, on the receipt that was issued to Mrs. Albrecht. Was there a valuation placed on that coat? A. No.

Q. There was no valuation placed?

A. No.

(Testimony of Meryl Kirkevold.)

Q. Did you set a valuation on your proof of loss? A. Yes.

Q. What valuation? A. \$75.00.

Q. How did you reach that valuation?

A. Well, by determining age and style—age of the coat by the style, and condition.

Q. Were you familiar with all of these coats?

A. Most of them, yes.

Q. And you feel that was a reasonable value of that coat at that time? A. Yes. [44]

Q. Reasonable market value?

The next one you have listed is Mable Andrews. Was a valuation placed on that coat?

A. Yes, the valuation was placed on that coat at the time it was brought in.

Q. What amount? A. \$150.

Q. In your opinion is that a reasonable valuation of that coat?

A. That was a fair valuation, yes, sir.

Q. The next coat is Mrs. W. J. Arteel. Showing you the receipt is there a valuation placed upon that coat?

A. The valuation was placed, yes, at the time it was brought in.

Q. What amount? A. \$180.

Q. In your opinion was that a fair valuation?

A. Yes.

Q. The next coat that is listed is Mrs. Ralph Babcock. Showing you the receipt, is that a valuation— A. Yes.

Q. What amount? A. \$200.

(Testimony of Meryl Kirkevold.)

Q. Is that a fair valuation of that coat?

A. No, I feel as though that coat was over valued, and we [45] have made a new valuation of a hundred dollars.

The Court: How much?

The Witness: One hundred dollars.

Q. You feel one hundred dollars was a fair valuation? A. Sufficient.

Q. That is the amount you have in your proof of loss? A. Yes.

Q. Though she had placed a valuation of two hundred dollars on her receipt? A. Yes.

Q. The next coat is Mrs. Howard Bair?

A. Yes.

Q. Showing you a receipt, was there a valuation placed upon that coat?

A. No, there was not.

Q. Did you place a valuation on that coat?

A. Yes, I did.

Q. What valuation? A. \$75.

Q. You feel that was a fair and reasonable valuation of that coat in its condition at that time?

A. Yes, I do.

Q. The next coat was Mrs. Emma Balke. Does that coat have a valuation placed upon it?

A. No, no. [46]

Q. Did you place a valuation on that coat?

A. Yes, we did.

Q. And of what valuation?

A. Well, on this proof of loss, I think the valua-

(Testimony of Meryl Kirkevold.)

tion has been cut down from the original one, hasn't it?

Q. What valuation did you place on the proof of loss?

A. In the proof of loss we put replacement of a new coat at time of settlement, I think it was.

Q. Well, did you think that valuation was high?

A. A little high.

Q. What do you think was the true valuation—market valuation of that coat?

A. It would be closer to two hundred and eighty dollars, instead of three hundred and twenty-five.

Q. Two hundred and eighty. Do you feel that is a fair valuation of that coat? A. Yes.

Q. The next coat is Mrs. Grace Bassey. That has a valuation listed of \$200? A. Yes, sir.

Q. Would that be a fair valuation of that coat?

A. Yes.

Q. Mrs. Hattie Baur, you show in your proof of loss a valuation of \$200. Is there any proof or value listed on the receipt? [47]

A. No, there was not.

Q. What would you contend would be a reasonable value of that coat?

A. Well, a coat of that type would be worth at least \$200.

Q. Worth at least \$200? A. Yes.

Q. That is the amount that you have placed in your proof of loss? A. That is right.

Q. You feel that is a fair valuation of that coat.

(Testimony of Meryl Kirkevold.)

Mrs. A. J. Beauchene. Was there any valuation placed upon that coat? A. No valuation.

Q. What did you place on that coat?

A. We—I placed a valuation of a hundred dollars.

Q. Do you feel that was a fair valuation?

A. Yes.

Q. Mrs. W. H. Beerman. What valuation was placed on that coat?

A. There was a valuation of \$200 placed on that coat.

Q. I remark at that time, that on that coat had Mrs. Beerman taken out a certificate policy?

A. Yes, she had.

Q. In that amount had the valuation been fixed in the [48] certificate policy? A. \$450.

Q. \$450? A. Yes, sir.

Q. In your proof of loss, however, you listed that only as \$200, is that correct? A. Yes.

Mr. Velikanje: Your Honor, at this time I remark as to the certificate policies. It has been admitted in pleadings these parties holding these had made due proof of loss individually on their certificate, and they have been assigned to Mr. Kirkevold.

The Court: The certificate policies were taken out with the defendant's company?

The Witness: That is correct.

Mr. Velikanje: That is correct, yes.

Q. Do you feel a valuation of \$450 on that coat was reasonable? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Mrs. Victor Belaire, was a valuation placed upon that coat? A. Yes, sir, \$350.

Q. What amount had you listed in the proof of loss? A. \$200. [49]

Q. And what amount had she taken out by certificate? A. Three hundred and twenty-five.

Q. And she had a certificate for three hundred and twenty-five? A. Yes.

Q. But the valuation of the receipt was three hundred and fifty? A. Yes.

Q. But you had listed in your proof of loss only the two hundred? A. Yes, sir.

Q. Mr. Kirkevold, I might ask you why did you list that at \$200 on your proof of loss?

A. Well, the reason for the \$200 listing was, we had a minimum storage charge of three dollars and a half, and we took valuations up to two hundred dollars for that three and a half, and when the customer would specify having other insurance, we just gave them the maximum for the three and a half service—or I mean a service charge for taking care of it.

Q. So far as your monthly listing then, on this coat, was listed with the company as \$200?

A. Yes, sir.

Q. But you paid them additional premium for this certificate policy? [50] A. Yes.

Q. Doris Benoit Bell, valuation listed——

A. Yes, \$200.

Q. Do you feel that is a reasonable valuation of that coat? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Mr. Kirkevold, many of these coats, would they be valued in excess of that?

A. No, as far as listing on our proof of loss, I wouldn't say it was fair except in cases where the customer may have paid more for her coat, and did not realize the value of it, or——

Q. But, if they wanted more than \$200 insurance, they had to pay an additional premium?

A. Yes.

Q. But this was the amount that you carried upon their coats? A. Yes.

Q. And for additional insurance they would have to carry an additional amount?

A. That is right.

Q. Mrs. Gregory Bitter, is there a valuation listed? A. Yes, \$200.

Q. Would you say that was a reasonable valuation of the coat? [51]

A. Well yes, it was the maximum for the storage charge. She had other insurance, though.

Q. She had an owner's policy? A. Yes.

Q. Do you have that policy?

A. Well, that is one of those that had the insurance. We paid four hundred.

Q. What would you say the reasonable value of her coat was?

A. It was a new muskrat coat. She had just purchased it the season before, and had only worn it during late in the season. She purchased it in May, so it had not been worn over maybe four or five months.

(Testimony of Meryl Kirkevold.)

Q. What was the reasonable value of that coat?

A. Well, \$400.

Q. \$400?

A. Yes. I am sure that is what it was.

Q. As a matter of fact, Mr. Kirkevold, in your settlement with her you paid her cash \$400?

A. Yes.

The Court: Well then, do I understand the company, according to your contention, had an insurance to the extent of \$400, \$200 in the blanket policy and \$200 additional.

Mr. Velikanje: No, \$200 additional in the certificate. [52]

Mr. Hutcheson, do you happen to have copies of the certificates?

Mr. Hutcheson: No.

Mr. Velikanje: Do you have a list of the certificate holders? Is her name listed in it—that is Bitter? Do you have her listed as a certificate holder?

Mr. Hutcheson: We don't have the certificate. However, I listed her and one other—yes, she is listed as one of the certificate holders, and which has been admitted, Your Honor.

Q. The next one is Mrs. Merritt Bloxom, Junior?

A. That was valued at the time the coat was brought in.

Q. Your receipt showed the valuation?

A. Yes, \$200.

The Court: How much?

(Testimony of Meryl Kirkevold.)

The Witness: \$200.

Q. Do you feel that is a reasonable valuation of that coat? A. Yes.

Q. Mrs. Mae Bobst? A. Mae Bobst?

Q. Valuation listed?

A. A hundred and fifty dollars at the time we got it.

Q. Do you feel that is a fair valuation of it?

A. Yes.

Q. Florence Bodine?

A. Yes, that was valued at the time she brought the coat in, \$150.

Q. In your opinion is that a fair valuation?

A. That is a fair valuation.

Q. Mrs. H. V. Brimmer?

A. That was valued at the time she brought the coat in at \$200.

Q. Is that a fair valuation? A. Yes, sir.

Q. Mrs. Fred F. Brown?

A. That was valued at the time that the coat was brought in at \$185.

Q. Do you feel that is a fair valuation?

A. Yes.

Q. Irene Bayson?

A. Irene Bayson, that was valued at the time at \$200.

Q. Do you feel that was a fair valuation on that coat? A. Yes, it is.

Q. I note in your receipt, that you paid her \$400. Did she have a certificate policy.

A. Yes, she had a policy.

(Testimony of Meryl Kirkevold.)

Q. She had a certificate policy. Do you have that name listed, Irene Bayson? [54]

Mr. Hutcheson: Yes.

Q. And then, what would you say would be the fair valuation of that coat?

A. Well, hers was a new coat that had been purchased the season before, and she put it in under the minimum. We just automatically put down a valuation of two hundred. That was the maximum she could get for her three and a half, because she had other insurance.

Q. But, what do you feel was the fair valuation of that coat. A. What we paid her was \$400.

Q. \$400? A. Yes.

Q. That was the amount of her certificate?

A. Yes.

Q. Barbara G. Burke?

A. Yes, that was valued at a \$125.

Q. And that is what you paid her in settlement?

A. Yes.

Q. You feel that was a fair valuation of that coat? A. Yes.

Q. Mrs. Thomas Busby?

A. Busby, that is right.

Q. Does that have a valuation listed?

A. A valuation of two hundred at the time she brought it in. [55]

Q. Do you think that is a reasonable valuation?

A. Yes.

Q. Mrs. W. H. Buttke?

(Testimony of Meryl Kirkevold.)

A. That was valued at two hundred at the time she brought the coat in.

Q. Do you feel that was a fair valuation?

A. Yes.

Q. Helen Campbell?

A. That was valued at the time it was brought in at a hundred and fifty dollars.

Q. And you made settlement with her for \$150?

A. Yes, sir.

Q. You feel that was a fair valuation?

A. Yes.

Q. Mrs. Rex Carman? A. Yes.

Q. I do not find a receipt on this coat?

A. That was——

Q. Do you know if there is.

A. There should be a receipt. Well, the receipt might have been burned.

Q. Were some of your receipts burned in the loss? A. Yes, there were.

Q. But, a receipt was issued for that coat?

A. That is right. [56]

Q. To the best of your knowledge was a valuation placed upon that receipt?

A. Yes, a valuation was placed at a hundred and fifty dollars.

Q. Do you feel that was a fair valuation for that coat? A. Yes.

Q. Mrs. Harold Cast? A. Yes.

Q. Was a valuation placed upon that coat?

A. No, that was the—there was no valuation placed on it.

(Testimony of Meryl Kirkevold.)

Q. There was none placed upon it at all?

A. No.

Q. What in your opinion was a reasonable valuation of that coat?

A. About a hundred and fifty dollars.

Q. Do you feel that was a reasonable market value of that coat? A. I do.

Q. Mrs. R. E. Chadwick?

A. That was valued at a hundred and fifty dollars at the time she brought the coat in.

Q. Was that a reasonable value of that coat?

A. Yes.

Q. What was that, an older coat?

A. Yes, it was probably three or four or five years old. [57]

Q. A Hudson Seal coat is much more expensive than that, as a new coat? A. Yes.

Q. But, you feel a hundred and fifty dollars is a reasonable valuation. Mae Chance?

A. That was valued at the time it was brought in at \$100.

Q. Do you feel that was a reasonable valuation?

A. I do.

Q. Mrs. Glen L. Clarke?

A. That was valued at the time it was brought in at a hundred and fifty dollars.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes, I do.

Q. Mrs. James Clements' cloth coat with Fox collar? A. Yes.

Q. Does that have a valuation listed?

(Testimony of Meryl Kirkevold.)

A. No, no valuation listed.

Q. What do you feel was a reasonable valuation of that coat? A. \$150.

Q. Is that what you listed in your proof of loss?

A. Yes.

Q. And is that what you paid her in settlement? [58]

A. That is what I paid her in settlement, yes, sir.

Q. A. L. Conkey? A. Yes, sir.

Q. What valuation?

A. That was valued at two hundred and fifty dollars at the time it was brought in.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes, I do.

Q. Alice Cox——

The Court: Was a coverage on that over the \$200?

The Witness: We valued hers at \$250. She paid the storage and extra premium for the extra fifty dollars.

Q. In your return to the insurance company, did you list that as two hundred and fifty dollars?

A. Yes.

Q. In your monthly report? A. Yes.

Q. Alice Cox?

A. That coat was not valued at the time—Yes, it was too, valued at a hundred dollars.

Q. Is that what you have in your proof of loss?

A. Yes. [59]

(Testimony of Meryl Kirkevold.)

Q. Do you feel that is a reasonable value of that coat? A. I do.

Q. Mrs. A. L. Cronholm?

A. That was valued at \$200.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes, I do.

The Court: You said \$200?

The Witness: Yes.

Q. Mrs. J. A. Dasdice?

A. That was valued at two hundred dollars at the time it was brought in.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes, I do.

Q. Mrs. F. C. Dawson?

A. That was valued at the time it was brought in at five hundred dollars. It was a red fox. That included—that was two—let's see she had another article valued at a hundred dollars, a black Caracul coat, and I believe she had another Caracul valued at a hundred dollars but it was not harmed by fire.

Q. In other words, she lost a Black Caracul that she had valued in your receipt at one hundred dollars and a Red Silver at five hundred dollars?

A. Yes.

Q. She had paid additional premium for that?

A. Yes, she did.

Q. You made a settlement with her, a cash settlement of \$600. A. I did, yes, sir.

Q. Do you feel that was a reasonable value of that? A. I do.

Q. Of those two coats. Mrs. W. Desmore?

(Testimony of Meryl Kirkevold.)

A. That was valued at the time it was brought in for a hundred and fifty dollars.

Q. And you made a settlement with her for a hundred and fifty dollars. A. Yes, sir.

Q. You feel that was a reasonable valuation of that coat? A. Yes.

Q. Gladys N. Dewar?

A. That was valued at the time it was brought in, a hundred and fifty dollars.

Q. Do you feel that was a reasonable valuation of it? A. I do.

Q. That was the amount of settlement you made with her? A. Yes.

Q. Mrs. C. C. Dormaier, valuation?

A. Yes, that was valued at the time it was brought in. [61]

Q. How much? A. \$200.

Q. You made a cash settlement of \$200 with her?

A. Yes, sir.

Q. You feel that was a reasonable value?

A. I do.

Q. Mrs. William C. Draper?

A. That was valued at the time it was brought in for two hundred dollars.

Q. And you made a cash settlement of two hundred dollars? A. Yes.

Q. And you feel that is a reasonable valuation?

A. I do.

Q. Mrs. Floyd C. Edwards?

A. Yes. That was valued at the time it was brought in for \$50.

(Testimony of Meryl Kirkevold.)

Q. You made a cash settlement of \$50?

A. Yes, sir.

Q. You feel that is a reasonable valuation?

A. Yes.

Q. Mrs. O. H. Erickson?

A. Yes, that was valued at the time it was brought in for \$200. I believe she had other insurance.

Q. Do you feel that was a reasonable valuation of this coat? [62]

A. No—Oh, that was our valuation of it, but she had a valuation in excess. I think with another company.

Q. She had insurance with another company?

A. Yes.

Q. You have secured an assignment to another company? A. Yes.

Q. You feel that valuation of \$200 is below the reasonable valuation of that coat? A. Yes.

Q. Mrs. Ed. Eschback?

A. That was valued—I don't think that it was. Yes, it was valued at the time it was brought in for \$150 or \$100, I mean.

Q. \$100? A. Yes.

Q. Well then, that amount on the Eschback should be changed to one hundred?

A. One hundred instead of one fifty.

Q. You feel that a hundred dollars is a reasonable value? A. Yes.

Q. Lillian Etl?

(Testimony of Meryl Kirkevold.)

A. Yes, it was valued at the time it was brought in at \$200.

Q. Do you feel that was a reasonable valuation of that coat? [63] A. I do.

Q. Mrs. Charles Eyman?

A. Yes, that was valued at the time for \$200.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes.

Q. Mrs. John E. Fetherstone?

A. That was valued at the time it was brought in for \$200.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. Hazel Fiebelkom?

A. That was valued at \$25.

Q. Just a child?

A. Just a child—baby coat.

Q. Do you think that was a reasonable value of that coat? A. Yes.

Q. Mabel Flater?

A. That was valued at the time it was brought in for two hundred and fifty dollars, and that was—I would say a very fair valuation.

Q. A very fair valuation. She paid an additional premium for that?

A. Yes, for the additional fifty dollars.

Q. Mrs. Del. Fleming?

A. She had two coats that were valued at the time they [64] were brought in.

Q. At what value?

(Testimony of Meryl Kirkevold.)

A. The one coat was valued at two hundred and one—the other coat at one hundred dollars.

Q. And do you feel those were reasonable values, also? A. Yes.

Q. That would be \$300, is that what you had listed in your proof of loss? A. Yes.

Q. Ruth Foran?

A. That was valued at the time it was brought in.

Q. At how much? A. At \$300.

Q. Do you feel that was a fair valuation?

A. Yes.

Q. In fact, you made a cash settlement with her?

A. For \$300.

Q. Mrs. George Fortier?

A. That was valued at the time it was brought in for \$200.

Q. However, she had a certificate policy?

A. Yes.

Q. In what amount?

A. In the amount of \$225.

Q. And that was the amount you paid her, \$225?

A. Yes. [65]

Q. That she had paid additional premium for that certificate? A. Yes.

Q. What amount is listed in the proof of loss?

A. Three hundred dollars.

Q. The proof of loss is listed at three hundred, and that should be reduced to two hundred and twenty-five?

A. Two hundred and twenty-five, yes, sir.

(Testimony of Meryl Kirkevold.)

Q. Mrs. H. R. Fox?

A. That was valued at the time it was brought in for a hundred and fifty dollars.

Q. Do you feel that was a reasonable valuation for that coat? A. Yes.

Q. Mrs. Ronald Fraser?

A. That was valued at the time for \$200.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. Mrs. A. E. Fuqua?

A. That was valued at a hundred and fifty dollars.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. You made a cash settlement with her at that time? A. Yes.

Q. Mrs. Gertrude Gannon?

A. That was valued—no, that was not—no valuation [66] placed on it.

The Court: The order in which these names appear here, on these releases, would be Mrs. Glotz.

Mr. Velikanje: Instead of Mrs. Gannon?

The Court: Yes.

Mr. Velikanje: Mrs. Gannon follows does she?

The Court: Yes.

Q. Mrs. W. Glotz?

A. Yes, that was valued at the time she brought it in at a hundred and fifty dollars. .

Q. You feel that was a fair valuation on the coat? A. Yes, sir.

Q. Gertrude Gannon?

(Testimony of Meryl Kirkevold.)

A. I believe that was not valued at the time it was brought in.

Q. There was no value placed on it?

A. No.

Q. What was the fair and reasonable value of this coat?

A. One hundred and fifty dollars.

Q. That is, you have listed it in your proof of loss? A. Yes.

Q. Were you familiar with that coat?

A. Yes.

Q. Mrs. A. J. Griffeth?

A. That coat was valued at the time it was brought in. [67]

Q. How much?

A. A hundred and fifty dollars.

Q. You have listed it in your proof of loss?

A. Yes.

Q. Do you feel that was a reasonable and fair value? A. Yes.

Q. Mrs. Harold J. Hague, was there a valuation placed on that coat?

A. No, not at the time it was brought in.

Q. What do you feel was the reasonable and fair valuation of that coat?

A. Three hundred and seventy-five dollars.

Q. What kind of a coat was it?

A. It was Natural Muskrat.

Q. You believe a fair valuation of that would be three hundred and seventy-five dollars?

A. I do.

(Testimony of Meryl Kirkevold.)

Q. Was that a new coat?

A. No, it was several seasons old.

Q. But still would have that valuation on it?

A. Yes.

The Court: Now, is this one of those that there was additional insurance——

Mr. Velikanje: I don't believe——

Q. Was that a coat in your shop for repair?

A. Yes, it was in there to be repaired, and some little thing on it at the time of the fire.

Q. In your report to the insurance company, what valuation was that coat listed?

A. Three hundred—yes, three hundred and seventy-five dollars.

Q. It would be listed at the reasonable value in your insurance company report? A. Yes.

Q. That is what you paid your premium on to the insurance company? A. That is right.

Q. Angeline Hall?

A. That was valued at the time it was brought in for a hundred dollars.

Q. And you feel that was a reasonable valuation? A. Yes.

Q. You made a cash settlement with her for a hundred dollars? A. Yes.

Q. Mrs. J. C. Hamilton?

A. That was valued at the time it was brought in for a hundred and seventy-five dollars?

Q. Was that a reasonable valuation?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. You made a cash settlement with her for that amount? [69] A. Yes.

Q. Agnes Hanratty?

A. That was valued at two hundred dollars.

Q. Was that the amount listed in your proof of loss? Do you feel that was a reasonable valuation?

A. No, that must be one of the coats that we have taken down the price, here.

Q. You feel that that—you have listed it at three hundred and fifty?

A. That was over valued.

Q. You feel that two hundred dollars should be the valuation on that?

A. Yes, that is what I paid her.

Q. Clara Harbin?

A. Now, the coat was valued at two hundred dollars at the time it was brought in.

Q. On this coat, however, she had other insurance and signed a release so you are making no claim for that? A. Yes.

Mr. Velikanje: That is correct, I think you secured the release on that.

Mr. Hutcheson: Yes, that release is in evidence.

Mr. Velikanje: Yes, there is a copy of it attached to that. [70]

Q. W. Harnden?

A. That was not valued. It was not valued at the time it was brought in.

Q. What in your opinion was the reasonable valuation?

(Testimony of Meryl Kirkevold.)

A. Well, a hundred and seventy-five dollars.
Is that the one——

Q. You have it listed here as three hundred dollars.
A. Yes, sir.

Q. But, you were able to make a cash settlement of a hundred and seventy-five dollars?

A. Yes.

Q. So that amount should be reduced to a hundred and seventy-five dollars?

A. A hundred and seventy-five dollars.

Q. Mrs. Dean Hartman?

A. That was valued at the time it was brought in for storage, a hundred and fifty dollars.

Q. You feel that was a reasonable valuation?

A. Yes.

Q. In fact, you made a settlement on that basis?

A. Yes.

Q. Mrs. C. P. Hayes?

A. That was valued at the time it was brought in for storage for two hundred dollars.

Q. You feel that was a reasonable valuation of that coat? [71]

A. Yes.

Q. Mrs. W. F. Herrette?

A. Yes, that was valued at the time it was brought in for storage at a hundred and fifty dollars.

Q. You felt that is a reasonable valuation?

A. Yes.

Q. You made settlement on that basis?

A. Yes.

Q. Beatrice Hillmer?

(Testimony of Meryl Kirkevold.)

A. That was valued at two hundred dollars at the time it was brought in.

Q. And you feel that was a reasonable valuation for that coat? A. Yes.

Q. Mrs. C. R. Holtzinger?

A. That was valued at two hundred dollars at the time it was brought in.

Q. You feel that was a reasonable valuation for that coat? A. Yes.

Q. Mrs. A. Hornsberger?

A. That was valued at the time it was brought in, seventy-five dollars.

Q. And you feel that was a reasonable valuation? A. Yes.

Q. And you made settlement on that basis? [72]

A. Yes, sir.

Q. Helen Jarvis?

A. That was valued at the time it was brought in for a hundred and eighty dollars.

Q. You feel that was a reasonable valuation?

A. Yes, sir.

The Court: A hundred and eighty dollars?

The Witness: Yes.

Q. Mrs. Fred E. Johnson?

A. That was valued at the time it was brought in for storage at a hundred and fifty dollars.

Q. You feel that was a reasonable valuation?

A. Yes.

Q. And you made a cash settlement with her on that basis?

The Court: You seem to have passed Edna Jahr.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: I have it right here.

Q. Edna C. Jahr?

A. That was valued at a hundred and forty dollars, at the time it was brought in for storage.

Q. You feel that was a reasonable valuation?

A. Yes, sir.

Q. You made a settlement with her on that basis?

A. Yes.

Q. She was in the WAVES at the time? [73]

A. Yes.

Q. Mrs. M. W. Jones?

A. She had an insurance policy and we put the maximum for the storage charge on the coat.

Q. Well, she had a certificate policy?

A. Yes, and the policy I think was three seventy-five—fifty.

Q. The policy you had issued a policy with this company of three hundred and fifty dollars?

A. Yes.

Q. Elizabeth Junker?

A. Yes, that was valued at the time it was brought in for storage at a hundred dollars.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. Mrs. C. H. Kinney?

A. That was valued at the time it was brought in for storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. Yes, sir.

Q. You made a cash settlement with her on that basis?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Mrs. Vernon Kiious?

A. That was valued at the time it was brought in for storage at two hundred and twenty-five dollars. [74]

Q. She paid an additional premium for that?

A. Yes.

Q. You feel that was a reasonable value?

A. Yes, I do.

Q. Ida Knight?

A. That was valued at the time it was brought in for storage at two hundred dollars.

Q. Do you feel that was a reasonable value?

A. I do.

Q. You made a cash settlement with her on that basis? A. Yes.

Q. Alice Mary Krause?

A. Yes, that was a valuation of two hundred dollars, was placed on her coat, which was a maximum for three and a half, but she carried an outside policy.

Q. The outside policy, however, was only for a hundred and fifty dollars, isn't that correct?

A. Yes.

Q. You had placed a value and reported to the insurance company the two hundred dollars?

A. Yes, sir.

Q. You feel two hundred dollars was a reasonable valuation for that coat? A. Yes.

The Court: Well, she had a three hundred [75] dollar value, a hundred and fifty dollars outside in-

(Testimony of Meryl Kirkevold.)

insurance. Do you mean she collected the outside insurance?

Mr. Velikanje: No, it was a certificate policy and which they have not paid anything. Mr. Kirkevold paid all that has been paid—made an adjustment with her and has taken an assignment.

The Court: It was over insured to the extent of a hundred and fifty dollars.

Mr. Velikanje: No, he had listed it as the valuation of two hundred dollars in the value that was placed upon the receipt when it was brought in, but she took out an additonal policy, Your Honor. I might refer to this Exhibit 1 and show you where that is done. You will notice the rider, it was issued pursuant to this rider on these policies.

The Court: No, but the actual value of the property that was lost by this fire was not two hundred dollars, but three hundred and fifty dollars.

The Witness: No, I would say two hundred dollars.

Mr. Velikanje: You see, she took out——

The Court: What I am trying to get at, the liability on that item, the liability would be [76] limited according to this witness to two hundred dollars.

Mr. Velikanje: That is correct, Your Honor. I will just hand you one of these so you can see what we are speaking about on those certificates.

The Court: And the witness here—the plaintiff in this action, and the agent likewise for the Home

(Testimony of Meryl Kirkevold.)

Insurance Company, the defendant in the issuance of these certificates——

The Witness: That is right.

The Court: I see.

Q. Mrs. E. E. Leach—I do not see—I believe there is an insurance policy on her. Do you show in your proof of loss—— A. Yes, there is.

Mr. Velikanje: Mr. Hutcheson, do you have a record of the owner's policy on Leach?

Mr. Hutcheson: Two hundred and fifty, according to mine.

Mr. Velikanje: I have a policy in here some place.

The Court: Well, that would indicate fifty dollars over the two hundred.

Q. You made a cash settlement with her of two hundred and [77] fifty dollars? A. Yes.

Q. In your opinion that was the reasonable value of the coat? A. Yes.

Q. Mrs. I. B. Lisle?

A. That was valued at the time it was brought in for storage at two hundred dollars.

The Court: Two hundred?

The Witness: Yes.

Q. Do feel that was a reasonable value of that coat? A. Yes.

Q. Elsie Logozzo?

A. Well,—that was not valued at the time it was brought in for storage. No valuation was placed on it at that time.

(Testimony of Meryl Kirkevold.)

Q. However, she had a policy certificate with the company? A. Yes.

Mr. Velikanje: Mr. Hutcheson, do you have the Logozzo listed in your certificates?

Mr. Hutcheson: I don't have those certificates. According to my personal notes, it is three hundred and fifty. I do not have the certificate.

Q. What was the valuation of Mrs. Logozzo's coat?

A. Well, I have five hundred dollars. It was a new coat. [78]

Q. It was a new coat? A. Yes.

Q. The insurance company has all of those records, is that correct? A. Yes.

Q. But you do not know what the amount of her certificate was? A. No.

Q. But, you feel the reasonable value of that coat was five hundred dollars? A. Yes.

Q. Mrs. Carl Lowenthal?

A. She had an insurance policy, and we had the maximum of two hundred placed on it at the time she brought it in for storage.

Q. But, she had a certificate in the amount of two hundred and twenty-five dollars, is that correct? A. Yes.

Q. And she was paid on that basis?

A. Yes.

Mr. Velikanje: Your Honor, here is the Leach policy that was out of place. It has a valuation of two hundred and fifty dollars on it.

The Court: Yes.

(Testimony of Meryl Kirkevold.)

Q. Mrs. William F. Lyon? [79]

A. That was valued at the time it was brought in at a hundred and fifty dollars.

Q. And you feel that was a reasonable valuation?
A. Yes.

Q. Mrs. Clark Mace?

A. Yes, that was valued at a hundred and twenty-five dollars at the time it was brought in for storage.

Q. You feel that was a reasonable valuation?

A. Yes.

Q. And you made a cash settlement with her on that basis? Patricia Magee?

A. That was valued at a hundred dollars at the time of storage.

Q. Do you feel that was a reasonable valuation?

A. Yes, I do.

Q. And you made a settlement with her for a hundred dollars cash?
A. Yes.

Q. Mrs. M. J. Martinez?

A. That was valued at the time of storage at two hundred dollars.

Q. And you feel that was a reasonable valuation?
A. I do.

Q. And you made a cash settlement of two hundred dollars with her? [80]
A. Yes.

Q. Elaine McCorkindale?

A. Yes, that was valued at two hundred dollars. She had a policy.

Q. That policy was in the amount of three hundred and fifty dollars?
A. Yes.

(Testimony of Meryl Kirkevold.)

Q. And you made an allowance with her?

A. Yes.

Q. On that basis? A. Yes.

Q. G. F. McGilvery?

A. That was—it was valued at two hundred dollars at the time it was brought in.

Q. She had other insurance?

A. She had outside insurance, yes.

Q. And that insurance company has assigned their claim to you? A. Yes.

Q. But, that valuation you feel, two hundred dollars was a reasonable valuation? A. I do.

The Court: That does not seem to be in this list of—McCorkindale—

Mr. Velikanje: Your Honor please, we offer in evidence the assignment from the insurance company. [81]

Q. Mrs. J. W. Mercke. Did you have a valuation listed?

A. Yes, it had a valuation of two hundred dollars.

Q. You feel that was a reasonable valuation?

A. Yes, I do.

Q. Lucille H. Messer?

A. That was valued at the time of storage at two hundred dollars.

Q. Do you feel that was a reasonable valuation of that coat? A. I do.

Q. Bee Metzger?

A. That was not—no valuation was placed on that at the time of storage.

(Testimony of Meryl Kirkevold.)

Q. What do you feel was the reasonable valuation of that coat? A. Six hundred dollars.

Q. You feel six hundred dollars was a reasonable valuation of that coat? A. Yes.

Q. That was a coat that was in for repair, is that correct? A. Yes.

Q. Mrs. H. R. Miller?

A. That was valued at the time of storage at three hundred dollars. [82]

The Court: Let's go back to this Metzger coat a moment. You say you think the value of it was six hundred dollars?

The Witness: Yes, that was the replacement value of that coat.

The Court: Well, upon this release you settled with her, did you for a hundred and forty dollars?

The Witness: Well, then that is over valued.

Mr. Velikanje: This is the amount that you paid her in settlement is that correct?

The Witness: That is right.

Q. But, you feel the reasonable value of the coat was six hundred dollars? A. Yes, sir.

Q. But, you made a settlement of a hundred and forty? A. Yes.

Mr. Velikanje: Any further questions, Your Honor?

The Court: No. But, the proof of loss was what, in this case?

The Witness: Six hundred dollars. That was a coat that was in for repairs.

(Testimony of Meryl Kirkevold.)

Q. That was a coat that was in for repairs, was it not? A. That is right. [83]

Q. Mrs. H. R. Miller?

A. Yes, that was valued at time of storage at three hundred dollars.

Q. And you feel that was a reasonable valuation of that coat? A. Yes.

Q. Betty Mixon?

A. That was valued at storage time at seventy-five dollars.

Q. Do you feel that was a reasonable valuation? A. Yes.

Q. And that was the amount you paid her in cash? A. Yes.

Q. Louise Mixon?

A. That was valued at time of storage at a hundred dollars.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. And you paid her cash in the amount of a hundred dollars? A. Yes, I did.

Q. Mrs. J. D. Moore?

A. That was valued—we paid her a hundred and fifty dollars cash.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. There was nothing listed on the receipt?

A. That was not on the receipt. It was burned.

The Court: Wasn't this a Russian Squirrel Roller coat?

(Testimony of Meryl Kirkevold.)

The Witness: Yes, that was the cost of the Squirrel coat that we gave to her.

The Court: A hundred and fifty dollars?

The Witness: Yes, in settlement.

Q. Do you feel that was the reasonable value of that coat? A. Yes.

Q. Mr. Kirkevold, you said a hundred and fifty dollars is the cost of a squirrel coat. You refer to wholesale or retail?

A. That was the cost to us.

Q. That was the cost to you? A. Yes.

Q. In other words, your retail value would be more than that? A. Yes.

Q. That is what you listed in your proof of loss, a hundred and fifty dollars? A. Yes.

Q. And that was the settlement you made with her. Florence Morrill?

A. Yes, that was not valued when it was brought in for storage.

Q. What in your opinion was the fair and reasonable value [85] of that?

A. Three hundred and twenty-five dollars. It was a new coat.

Q. And you replaced that coat? A. Yes.

Q. And you feel that three hundred and twenty-five dollars is a reasonable value of that coat?

A. Yes.

The Court: Did you put in your proof of loss the sum of three hundred and twenty-five dollars?

The Witness: Yes.

The Court: Well, if you were limited to two

(Testimony of Meryl Kirkevold.)

hundred dollars, was there additional certificate of insurance out on this coat?

The Witness: Let's see.

Mr. Velikanje: I don't believe there would, Your Honor. This was a repair coat.

The Court: It was not a storage coat.

Mr. Velikanje: No, this was a repair coat.

Mr. Hutcheson: There was no certificate on that.

The Court: I understood it to be a storage.

Mr. Velikanje: You see, when it is brought in for repair, there is no insurance charged on it. [86]

The Court: Yes.

Q. Opal Morse?

A. That was valued at time of storage at two hundred dollars.

Q. On the receipt, what is the valuation?

A. I mean, at a hundred and fifty dollars on the receipt, and we have changed our valuation on our proof of loss to a hundred and fifty dollars.

Q. Then, it should be a hundred and fifty dollars instead of two hundred? A. Yes.

Q. On that Mrs. Opal Morse? A. Yes.

Q. You feel a hundred and fifty dollars is a reasonable valuation? A. Yes.

Q. Mrs. C. W. Munsil?

A. Yes, that was one of the receipts that were burned, I think, and we gave her allowance on her coat, which was a fair valuation of it.

Q. You feel a hundred dollars was a fair valuation on that coat?

A. Yes, that was one where the receipt was lost.

Q. You feel the receipt was issued for that?

(Testimony of Meryl Kirkevold.)

A. Yes, it was.

Q. Mrs. Elmer R. Nelson? [87]

A. That was valued at time of storage at a hundred and fifty dollars.

Q. Do you feel that was a fair and reasonable valuation? A. Yes.

Q. She only had the one coat? A. Yes.

Q. Mrs. Harry Odell?

A. That was a repair coat, and we valued the coat at six hundred dollars.

Q. However, you were able to make a cash settlement with her for two hundred dollars?

A. Yes.

Q. However, you feel that six hundred dollars was a reasonable value of the coat?

A. Yes, I do.

Q. Mrs. J. E. Orth?

A. Mrs. J. E.—that was valued at—well, there was no valuation made on that item at storage time.

Q. What do you feel was the reasonable valuation of that coat?

A. I settled with her for seventy-five dollars, which we have listed here. Yes, seventy-five dollars is what we have listed.

Q. You think seventy-five dollars is a reasonable valuation for that fur? [88] A. Yes.

Q. You list it in your proof of loss, however?

A. I have.

Q. Inez F. Palmer?

A. The valuation was placed—she had two items

(Testimony of Meryl Kirkevold.)

—two articles here, and the valuations were placed on them at time of storage Alaska Seal coat at four hundred dollars, and two collars and a Hudson Seal cape at a hundred dollars.

Q. You feel that five hundred dollars is a reasonable value? A. Yes.

Q. Was that the amount of your cash settlement to her? A. Yes.

Q. Mrs. Mose Patnode?

A. That was valued at time of storage at a hundred and thirty-five dollars.

Q. And you feel that was a reasonable valuation? A. Yes.

Q. Laura Peterson?

A. That was valued at two hundred dollars at time of storage.

Q. You feel that was a reasonable valuation?

A. I do.

Q. H. C. Pollard? [89]

A. That was valued at time of storage at a hundred dollars.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. Merle Poulter, was valuation listed?

A. At a hundred and fifty dollars.

Q. Do you feel that is a reasonable valuation?

A. Yes.

Q. That was the cash settlement you made on that? A. Yes.

Q. Mrs. Ada Pulos?

(Testimony of Meryl Kirkevold.)

A. That was valued at a hundred dollars at time of storage.

Q. You feel that was a reasonable valuation?

A. Yes.

Q. You made a cash settlement on that basis?

A. Yes.

Q. Mrs. Rodney Ryker?

A. Well, that was valued at time of storage at two hundred dollars.

Q. You believe that was a reasonable valuation?

A. I do.

The Court: I don't have that one here.

Mr. Hutcheson: It is several points down, alphabetically.

The Court: Yes, I find it. [90]

Mr. Velikanje: That was two hundred dollars, Your Honor. I will try and bring that in line, them.

The Court: The Court feels that you should follow the Pulos.

Mr. Velikanje: You are having us follow the Pulos now? I am just taking these, but it would come between Pulos and Reich.

The Court: It does not matter.

Q. Mrs. Nan Ross—do you find that?

A. Yes, that was valued at storage time at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. Yes, I do.

Mr. Velikanje: If Your Honor can tell us where I am off.

(Testimony of Meryl Kirkevold.)

The Court: This Ross is off, also.

Mr. Velikanje: If Your Honor will tell me which is your next one.

The Court: The next one is Katie Reich.

Q. Mrs. William Reich?

A. That had no valuation at the time of storage. We placed a valuation—or the maximum valuation of two hundred dollars for the storage charges.

Q. You feel two hundred dollars was a reasonable amount? A. I do. [91]

Q. You settled with her on the basis of two hundred dollars? A. Yes.

Mr. Velikanje: What is your next one?

The Court: Irene Reischl.

Q. Irene Reischl?

A. At time of storage it was valued at two hundred dollars.

Q. You feel that was the reasonable valuation of that coat? A. Yes.

The Court: The next one is W. G. Richards.

Q. Mrs. Gordon Richards?

A. That was valued at the time of storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: The next is Mrs. Clarence Ritchie.

Q. Mrs. Clarence Ritchie?

A. That was valued at time of storage at two hundred dollars.

(Testimony of Meryl Kirkevold.)

Q. You feel that was a reasonable valuation for——

A. Yes, I do.

The Court: Then, it is Robinson, K. G.

Q. Mrs. K. G. Robinson? [92]

A. That was valued at—she had two articles. One was not destroyed, and the article that was destroyed was valued at seventy-five dollars at time of storage.

Q. The one that was destroyed was seventy-five dollars. You feel that was a reasonable value?

A. I do.

The Court: Now, the next one is Nan Ross, that he testified to.

Mr. Velikanje: We have that, and then we will follow right—we have them in order.

The Court: Then following that is Ryker.

Mr. Velikanje: Well, we have gone through that.

The Court: Following that is Mrs. G. A. Schmidt.

Q. Mrs. G. A. Schmidt?

A. That was valued at the time of storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. Yes, I do.

The Court: The next one is Rudolph Schmidt.

Q. Mrs. Rudolph Schmidt?

A. That was valued at time of storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: Schoonover.

(Testimony of Meryl Kirkevold.)

Q. Mrs. Jack Schoonover?

A. That was valued at time of storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: Next one is Mrs. Verda Shaw.

Q. Verda Shaw?

A. That was valued at time of storage at seventy-five dollars.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: Shirran, it looks like.

Q. Mrs. W. C. Shirran?

A. That was valued at two hundred dollars at the time of storage.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: Souther.

Q. Mrs. Frank Souther?

A. That was valued—or there was no valuation placed on that at the time of storage.

Q. What, in your opinion was the reasonable valuation of that coat? [94]

A. Two hundred direct replacement of that coat, was two hundred and eighty-one dollars and sixty-seven cents. That included all taxes.

Q. However, you listed in your proof of loss?

A. Two hundred and fifty dollars.

Q. You replaced that coat? A. Yes.

The Court: Spinner.

Q. Mrs. H. R. Spinner?

(Testimony of Meryl Kirkevold.)

A. That was valued at two hundred dollars at the time of storage.

Q. And you feel that was a reasonable valuation of that coat? A. Yes.

Q. Gladys Stanley?

The Court: No, Dorthea Stanley—Mrs. F. D. Stanley, Dorthea.

Q. Dorthea Stanley?

A. We had placed on the certificate two hundred dollars for two articles that—which was the maximum, but she had a policy which I think was eight hundred dollars or something.

Q. Your receipt shows an insurance of eight hundred dollars?

A. Yes, that was one of the certificate policies with the company. [95]

Q. And paid a premium on that on the basis of eight hundred dollars? A. Yes.

Mr. Hutcheson: You stated a moment ago you placed on the certificate two hundred. You meant, on the receipt, didn't you?

The Witness: I mean on the receipt, yes, that is right.

Q. You also show a valuation of eight hundred dollars on the receipt, too? A. Yes.

Mr. Hutcheson: You say on the receipt?

Mr. Velikanje: Yes, there is a value of eight hundred dollars on the receipt.

Mr. Hutcheson: Well, the receipt speaks for itself.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: Your Honor care to see this one while we are referring to it?

The Court: Well, what I want to get clear is that—did you pay the eight hundred dollars to this woman?

The Witness: Yes, cash settlement of eight hundred dollars.

The Court: And you took an assignment of her rights under this insurance? [96]

Mr. Velikanje: Now, which one next?

The Court: The next one is Gladys.

Q. Gladys Stanley?

A. That was valued at time of storage at a hundred and fifty dollars.

Q. And you feel that was a reasonable value?

A. Yes.

Q. And you paid her one hundred?

A. A hundred and fifty dollars, yes, sir.

The Court: Next one is Mrs. Stoltenow.

Q. Mrs. B. W. Stoltenow?

A. That was valued at time of storage at a hundred dollars.

Q. You feel that was a reasonable valuation?

A. I do.

Q. And you made a cash settlement of one hundred dollars. Agnes M. Stuart?

A. That was a repair coat, and skins. She had a set of skins and the valuation would be three hundred and fifty dollars.

Q. That was repair—she did not pay any insurance? A. No.

(Testimony of Meryl Kirkevold.)

Q. But, you listed it in your monthly report on that basis?

The Court: Three hundred and fifty dollars?

The Witness: Three hundred and fifty dollars.

Q. You feel that is a reasonable valuation of those articles? A. I do.

Q. John H. Stumpf?

A. That was valued at two hundred and fifty dollars at time of storage.

Q. You feel that was a reasonable valuation?

A. I do.

Q. They had paid an additional premium for that? A. Yes.

Mr. Velikanje: Maybe we are mixed up on these again.

The Court: Thelma Taliaferro.

A. That was valued at a hundred dollars at time of storage.

Q. Do you feel that was a reasonable valuation?

A. I do.

Q. I note in your receipts you gave her a hundred and twenty-nine dollars and seventeen cents allowance.

A. Well, I guess on that I gave her that allowance.

Q. But you feel the reasonable value was——

A. A hundred dollars.

The Court: Thacker.

Q. Mrs. Cecil Thacker?

A. That was valued at two hundred dollars at time of [98] storage.

(Testimony of Meryl Kirkevold.)

Q. You feel that was a reasonable value?

A. Yes, sir.

Q. Did you settle with her for eighty-six dollars?

The Witness: No, no, she got a new coat. It was a new coat.

Q. These figures should not be in there should they? A. No.

Q. They do not have any bearing on this matter—I don't suppose they should be on these others?

The Court: This release shows in consideration that eight dollars and four cents——

Mr. Velikanje: Here is the original release. Mr. Hutcheson, did you see the originals? I think that is a mistake.

Q. Do you know what you did with that in settlement?

A. Well, they got the new coat, and we allowed her——

Q. Do you know what those figures mean?

A. No.

Q. Then, that eighty-six dollars and four cents does not bear upon that?

A. I don't think so.

Mr. Velikanje: If your Honor please, we can separate this.

The Court: I think you had better, because it [99] will be questioned.

Mr. Velikanje: Well, it is already in as an Exhibit. Mr. Hutcheson has approved these, but he has approved them on the basis of my submitting those to him.

(Testimony of Meryl Kirkevold.)

Mr. Hutcheson: What do you mean by "approved"? I haven't approved anything.

The Court: Well, you admitted the validity of all of the receipts, but I believe you can bring it out in the evidence.

Q. Now, Mr. Kirkevold, your settlement with Mrs. Thacker, you did not pay her eighty-six dollars and four cents?

A. No, she got a new coat.

Q. Based on the value of two hundred dollars?

A. Yes.

Q. And that eighty-six dollars and four cents should not be on this at all? A. No.

Q. It has no bearing on the settlement?

A. No.

Q. Mrs. David G. Thomas?

A. That was valued at the time of storage. Oh yes, she had two articles. One was not destroyed, and the coat that was destroyed was valued at a hundred dollars.

Q. Do you feel that was the reasonable value of that coat? [100] A. Yes.

Q. Elsie Steele Thomas?

A. That was one of the articles where the receipts were burned, so we haven't that, so the valuation was placed on it at two hundred dollars. That would be the maximum valuation for that—for the storage charges.

Q. Do you feel that was a reasonable value of that coat? A. Well, that was, yes.

(Testimony of Meryl Kirkevold.)

Q. And you made a cash settlement with her for two hundred dollars? A. Yes.

Q. Mrs. J. C. Thompson?

A. That was a valuation of two hundred dollars placed on the garment at the time of storage.

Q. You feel that was a reasonable valuation of it? A. Yes.

Q. Mrs. Rex Tilton?

A. That was just in for repairs and no valuation on the certificate or receipt, but we originally put in a hundred and seventy dollars and settled for seventy-five, so we reduced that to seventy-five dollars.

Q. Seventy-five dollars, but you feel the reasonable value of that was one hundred and seventy dollars? A. That is right.

Q. But, you were able to settle for seventy-five? [101] A. That is right.

Q. Mrs. Glen D. Timpke?

A. That was valued at two hundred dollars at time of storage.

Q. You feel that was a reasonable value?

A. I do.

Q. You made a settlement with her for two hundred dollars? A. Yes.

Q. Mrs. Charles Verd?

A. That was a receipt that was burned, and that was a new muskrat coat, and we have valuation of three hundred and fifty dollars.

Q. And you replaced that coat? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. They had already paid for the coat that you—— A. Yes.

Q. And you made a settlement with them on the basis of three hundred and fifty dollars?

A. Yes.

Mr. Hutcheson: Pardon me, was there any receipt as to——

Mr. Velikanje: No, there is a tag ends of them here. It is just the corners with the name is all that is left of all of the receipts.

The Court: Your proof of loss was made on the basis of three hundred and fifty dollars?

The Witness: Yes.

Q. Mrs. James Vivian?

A. That was a repair coat, no valuation was placed on the receipt.

Q. What do you feel was the reasonable and fair valuation of that coat?

A. One hundred and fifty dollars.

Q. Is that the amount you put in your proof of loss? A. Yes.

Q. Mrs. Carlyle Wait?

A. There was no valuation placed on that ticket or receipt at time of taking it in, and we settled for two hundred and twenty-five dollars.

Q. You feel that two hundred and twenty-five dollars is a reasonable and fair value of that coat?

A. Yes.

Q. That is the amount you list in your proof of loss? A. Yes.

Q. Mrs. C. J. Walsh?

(Testimony of Meryl Kirkevold.)

A. That was a valuation of two hundred dollars placed on the garment at time of storage.

Q. And you feel that was a reasonable value?

A. Yes, I do.

Q. You made a cash settlement on that basis?

Mrs. Harold Warner——

Mr. Velikanje: Oh, let me get these in order.

Q. (Continuing): Mrs. A. K. Warner?

A. There was a valuation of two hundred and fifty dollars placed on that coat at time of storage.

Q. They paid additional storage. You feel that is the reasonable value? A. Yes.

Q. And that is the amount you settled for?

The Court: Mrs. Harold Warner, you made no claim for loss there.

Mr. Velikanje: Mrs. Harold Warner?

The Witness: I think that is——

Mr. Hutcheson: I believe you told me you were not making any claim for her.

The Witness: Yes.

Mr. Velikanje: That is right, it says “No damage to coat” here on the release.

Q. Mrs. Wright Wiehl?

A. There was a valuation of two hundred dollars placed on this garment at time of storage.

Q. Do you feel that was a reasonable valuation?

A. I do.

Q. Mrs. D. A. Williams? [104]

A. There was a valuation of a hundred and fifty dollars placed on this coat at time of storage.

Q. You feel that was a reasonable valuation?

(Testimony of Meryl Kirkevold.)

A. Yes.

Q. Mrs. Ed. Willson?

A. And that was—there was a valuation of two hundred dollars placed on that coat at time of storage?

Q. And you feel that was a reasonable valuation?
A. Yes.

Q. Mrs. Delbert Wright.

A. The valuation of a hundred and fifty placed on the receipt.

Q. She had two coats listed, has she not?

A. Oh yes, one was listed at a hundred and fifty. That coat was not destroyed. The coat listed at a hundred dollars was destroyed.

Q. You feel that was the reasonable value, and that is what you settled at?
A. Yes.

Q. Mrs. Paul F. York?
A. Yes.

The Court: Well, did you have those in evidence? That seems to conclude this list that you had.

Mr. Velikanje: There are two more listed [105] on the proof of loss. Mrs. Paul F. York, she had a policy?

The Witness: Yes, I am pretty sure she had a policy.

Mr. Hutcheson: She did not have any certificate.

The Witness: Oh, that was on—that is right.

Q. The valuation is listed?

A. Three fifty, yes.

Q. Three fifty. Do you feel that is a reasonable valuation?
A. Yes.

(Testimony of Meryl Kirkevold.)

Q. And that is what you made settlement upon?

A. Yes.

The Court: Were those in evidence as part—

Mr. Velikanje: Yes, they are.

Q. Now, there is one more listed on there.

A. Irene Bryon.

Mr. Velikanje: I will have to look that up, your Honor. There is another release here. However, Mrs. Bryon had a certificate policy, and made proof of claim, but I will have to look for our assignment on that. I am sure we have one.

Q. Now, Mr. Kirkevold, all of those coats that you have [106] listed here were destroyed?

A. Yes, sir.

Q. Or so seriously damaged there was no salvage value from them? A. Yes, sir.

Q. At the time that Mr. McKinley, the insurance adjuster looked at all of those coats, he advised you that the insurance company desired no salvage from them? A. Yes, sir.

Q. So far as he was concerned, it was a complete loss, is that correct? A. Yes.

Q. Now, Mr. Kirkevold, where were these coats at the time they were destroyed?

A. At the time when the coats were destroyed, was in our working quarters, and also a room where we had coats hanging ready to be worked on.

Q. Could you draw—

Mr. Velikanje: Mr. Hutcheson, would you have any objection, if we used this diagram?

Mr. Hutcheson: No.

(Testimony of Meryl Kirkevold.)

Q. All of these coats were at the Barnes-Woodin at 301 East Yakima Avenue, were they not? A. Yes. [107]

Mr. Velikanje: I am going to have to make some changes, because this is not a correct drawing. He will have to make some changes on it.

You might as well put it up there.

The Court: I think before we go into that, we will take a recess for ten minutes.

(Recess.)

Q. Mr. Kirkevold, I wish you would show on identification 5 where those coats were stored. Perhaps, if you take a red pencil, would you mark with red pencil where the coats that were destroyed were at the time?

A. Well, there was a rack of coats hanging along this partition here (indicating).

Q. Mark that "A".

A. And this doorway is over to this corner a little too far. The door should be a little more over this way (indicating).

Q. More to the south?

A. Yes, because we had a small rack over here with just a few more coats, and then we had one long rack back in this room (indicating).

Mr. Velikanje: Mark that "B".

A. (Continuing): And several small racks in here (indicating), say three or four—I am not certain now. [108]

Q. Now, the coats that were destroyed were at the places marked "A" and "B"—those were customers' coats? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. In this diagram I wish you would explain to the Court what the different spaces were used for, or just explain this exhibit or this identification 5.

A. Well, this was our sales room (indicating).

Q. Just mark that sales room, Mr.—

A. Sales room with bins or new coats hung in these bins around the sales room, and this was a work room (indicating) along these windows, all along the side of this wall and down to here (indicating), and there was a work room in here (indicating). We had a work table in this space right in here (indicating).

Q. And what was the rest of the space used for?

A. Oh, here is—there was a catwalk along here, with a partition. There is a partition. The balcony edge is right—

Mr. Velikanje: Mark that partition “B”.

Q. Now, was that partition way up to the ceiling?

A. Way up to the ceiling, yes.

Q. And the space to the north “B” and back to what you call a work table?

A. Yes.

Q. What was that used for? [109]

A. This space right in here, what I have got—

Q. No, the space back—

A. Oh, this was a storage room where we hung our coats as they came in.

Q. Now—

Mr. Hutcheson: Of course, the Court understands that we are objecting to that as the conclusion of the witness. That is a question for the Court to decide, whether that was a storage room

(Testimony of Meryl Kirkevold.)

or not. I think he should state what they did in that space and leave the Court to decide the question.

The Court: Yes, proceed. You will have an opportunity to cross examine, Mr. Hutcheson.

Q. Now, you referred—mark that store room, that which you referred to as store room.

Mr. Hutcheson: We objected to that. That is a question for the Court to decide. What that room is.

Mr. Velikanje: You will have your opportunity, I believe.

The Court: Yes, proceed.

Q. Now, referring to what you have marked there as store room, what coats were stored in that room? A. All customers' coats.

Q. Did you have another storage room? [110]

The Court: Go ahead.

Q. Did you have another storage room?

A. Yes, we had a storage room on the floor above.

Q. What was the storage room upstairs used for?

A. That was our permanent—well, permanent storage room, after all of the work had been done on the coats, if there was any work to be done.

Mr. Velikanje: Sit down there.

Q. Now, Mr. Kirkevold, I wish you would just explain to me what happened when a coat came into your place for repairs.

(Testimony of Meryl Kirkevold.)

A. The coat was taken in, in the sales room and ticketed.

Q. Is that where your receipt was issued?

A. Yes, sir, in the sales room, and the coat was brought back and hung in our storage room on that floor in the back, until we—such time as we were able to get to work on it, or whatever had to be done.

Q. And then a coat that was brought in for repairs, after the repairs were completed, where was that coat taken?

A. After all of the repairs?

Q. The repairs were done.

A. Then it was taken upstairs. [111]

Q. Even though it was not there for storage?

A. No, the room upstairs was reserved for storage—paid storage.

Q. For paid storage. What would happen to a coat that was in for repairs that the customer was going to come and get a week or two weeks after your repairs were done?

A. Oh, that would hang in the storage room downstairs.

Q. That would be put back in that storage room?

A. Yes.

Q. Now, you say when you had a customer's coat come in for storage, what would be done?

A. That would go through the same process. It would be ticketed in the sales room and brought back to this storage room until such time as we could—every coat that came in was checked over before it was put upstairs.

(Testimony of Meryl Kirkevold.)

Q. Then, after your coat was received in the sales room you say it was taken back to what you have marked the store room? A. Yes.

Q. And how long would it be left there?

A. Some times it would be left there a month, or maybe a little longer.

Q. Before your force could get to it? [112]

A. Yes.

Q. Was there any work of any kind being done in this store room? A. No.

Q. Was it used exclusively for storage?

A. Yes.

Q. Back—at the back part of the store room were there some shelves?

A. Yes, some shelves with boxes in them that had fur pieces in them.

Q. Those were not customers' fur pieces?

A. No.

Q. Those were your own?

A. Yes, sir, that was our storage room for them.

Q. After a storage coat came into the store and put in this store room you say for a month or more?

A. Yes, sir.

Q. Then where was it put?

A. Then, as the date—we tried to get our coats out according to date—we would come in and get the coat and take it out and do the work on it.

Q. That would go into this part marked "A"?

A. Yes.

Q. And after the work was completed, then what?

(Testimony of Meryl Kirkevold.)

A. Then it would go upstairs to the next floor.

Q. If your coat was in there for cleaning, as well, where would it be taken?

A. It would be taken back to the same room, and then taken out and taken up—our cleaning room was on another floor, and cleaned.

Q. This was on the mezzanine, was it not, of the Barnes-Woodin Company? What you call the cash paying or permanent store room, was on the second floor? A. Yes.

Q. Now, let's see if I follow that, if a coat was in for cleaning and for storage it would first go through the work room and would be checked over, is that correct? A. Yes.

Q. What would they do in the work room?

A. Well, if it had rips, they would repair it and sew it up, or if it was to be re-styled, that was done there. For relining, that was done there.

Q. How about—did you demoth their coats?

A. Yes.

Q. Where was that done?

A. On the second floor.

Q. In your cleaning department? A. Yes.

Q. Mr. Kirkevold, I did not ask you before. What is your experience with furs? [114]

A. Well, I have been in the fur business—it is the only work I have done. I have been in it since 1926, which makes it 40 years, this year, I mean, 20 years, this year.

Q. How old are you?

A. 35. I will be 36.

(Testimony of Meryl Kirkevold.)

Q. You have been in the fur business since 1926? A. Yes.

Q. Have you been exclusively in the fur business all of the time?

A. Yes, up until—oh, a few months in '43 and '44. I had some—I was on a ranch.

Q. But, you still had your fur business, too?

A. Yes.

Q. You started in 1928? A. Yes.

Q. Were you still in high school?

A. Yes, the last two years in high school.

Q. But—have you been in your own fur business? A. In the fur business since then.

Q. You feel you know furs pretty well?

A. Yes, I do.

Q. Now, these valuations that you placed on these furs before, are based upon your knowledge of furs over a period of twenty years? [115]

A. Yes.

Q. Mr. Kirkevold, what percentage of customers' furs that were destroyed in this fire were in the work room on these racks marked "A", and what per cent were in the back part that you have marked store room?

A. Well, I would say that in the store room there were seventy-five to eighty per cent.

Q. Of the coats?

A. Of the coats that were destroyed in the fire were there.

Q. After the mess of the fire, it was impossible to tell what coats were where, is that correct?

(Testimony of Meryl Kirkevold.)

A. Yes.

Q. But, would that be about your percentage?

A. Yes.

Q. Were you at the peak of your season at that time?

A. No, it was early, just starting in the storage season.

Q. But your coats were coming in quite rapidly, at that time?

A. The weather had broken just previously to that. I mean, the weather had gotten warm enough so that customers started bringing their coats in at that time. [116]

Q. Those coats were in that storage space?

A. Yes.

Q. When storage coats came in, were they ever put directly into the upstairs storage?

A. No.

Q. Why not?

A. We advertised that—in our advertising that we checked over the coat. It goes through several little steps that we have, and each coat has to be examined.

Q. Also do you demoth it before it is put in?

A. Sometimes. We never put a coat in our permanent storage with moths in it.

Q. You had a practice then of never putting coats directly into the upstairs storage?

A. That is right.

Q. Did they always go through this process that you have referred to here?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Mr. Kirkevold, I hand you Plaintiff's identification 6. What is that?

A. Well, that is what we call our six-point program for storage. It is the process that the coat goes through, and what is taking place with the coat.

Q. Was this process—or this circular out at the time [117] of the fire?

A. Yes, we have had that since early '43.

Q. Did you represent to your customers that their coats were all insured? A. Yes.

Q. Was this same program published over the radio? A. Yes, it was.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: That is objected to, if the Court please, as immaterial, irrelevant and incompetent—purely a self-serving declaration of the plaintiff himself and has probative value, whatever.

Mr. Velikanje: This Exhibit 6, was that circulated among the employees of the Barnes-Woodin Company?

The Witness: Yes, sir.

Q. Did you have—also have similar circulars put out in public?

A. We had stuffers that were put in the envelope with the statement.

Q. Similar to this? A. Yes.

Q. And you were doing that at the time of the fire, or previous to that? [118] A. Yes.

The Court: The objection will be overruled and it will be admitted in evidence.

(Testimony of Meryl Kirkevold.)

(Whereupon, copy of six-point program referred to was then received in evidence and marked Plaintiff's Exhibit #6.)

Q. In hand you plaintiff's identification 7. What is this?

A. This is advertising copy of the local newspaper.

Q. Did you consistently advertise in the paper?

A. Yes.

Q. Similar to this? A. Yes.

Q. This is dated June 9th, 1944. It would be just one month after your fire, is that correct?

A. Yes.

Q. But, had you been doing similar advertising to this?

A. The old advertising records were not kept when the new company took over the Barnes-Woodin Company.

Mr. Hutcheson: That is objected to as incompetent, irrelevant and immaterial, and purely a self-serving declaration, not binding on the defendant in any way.

The Court: The same class, I presume. Does it have anything in there with reference to insurance? [119]

Mr. Velikanje: It has, your Honor.

The Court: Objection will be overruled, and it will be admitted in evidence.

(Whereupon, advertising copy referred to was then received in evidence and marked Plaintiff's Exhibit #7.)

(Testimony of Meryl Kirkevold.)

Q. Mr. Kirkevold, were there customers' coats anywhere in the Barnes-Woodin Company except in the upstairs store room, in the cleaning—you can hardly call it a room, your cleaning establishment, wasn't it out on a landing?

A. Yes, it was on a landing.

Q. But, you call that the cleaning room, and then there were these in the repair department or your service department, and these in the downstairs store room? A. Yes.

Q. Were there coats in any other place, or could there have been coats in any other place?

A. Well, there could have been coats in the receiving room.

Q. Where is that?

A. Well, that is in the basement, on the basement floor.

Q. And what is the receiving room used for?

A. Well, that is receiving all merchandise coming into the store. [120]

Q. Where is your merchandise handled—that is, going out of the store——

A. And that is also where it is taken when it leaves the store.

Q. Let us state, as an example, that a customer called and wanted her coat sent out to her. Where would that coat be sent?

A. We would wrap it and send it—take it down to what we call the receiving room, where a messenger would pick it up and deliver it to her.

Q. Then, outside of the two storage rooms, you

(Testimony of Meryl Kirkevold.)

had your cleaning room and your repair room and the receiving room? A. Yes.

Mr. Hutcheson: Of course, I object to that as leading and suggestive, for counsel himself to call this a store room.

The Court: I think it is.

Mr. Velikanje: That is correct.

Q. From whom did you receive your customer policy—the policy that is in question?

A. From Hargraves and Orkney.

Q. Did they handle off your insurance at that time? A. Yes, they did.

Q. Who was the person in that office that you dealt with? [121]

A. His name is James Orkney.

Q. James Orkney? A. Yes.

Q. I hand you plaintiff's identification 8. What is that?

A. That is a record of insurance.

Q. Where did you secure that record from?

A. From Hargraves and Orkney.

Q. Do you know whose writing that is in?

A. No. I can't say. It was given to me by——

Q. Was it filled in at at the time it was given to you?

A. Yes, it was filled in at the time it was given to me.

Q. It was given to you by James Orkney?

A. James Orkney, yes.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: That is objected to as incom-

(Testimony of Meryl Kirkevold.)

petent, irrelevant and immaterial. It does not refer to a Home Insurance Policy at all. It refers to several policies in other companies, and no showing——

Mr. Velikanje: That is the number of this policy.

Mr. Hutcheson: I see I am in error, it does refer there to the Home Insurance Company, but is wholly immaterial so far as proving any issue in this case is concerned, or showing anything within the authority of an agent of the insurance company.

Mr. Velikanje: The second from the last one, [122] there, Your Honor, is the policy that is in question.

Mr. Hutcheson: Since the issuance of the policy is not in dispute, I don't think that proves anything.

The Court: Objection will be overruled.

(Whereupon, record of insurance referred to was then received in evidence and marked Plaintiff's Exhibit No. 8.)

Q. Did you go over your policies with Mr. Orkney? A. Yes.

Q. Did he ever advise you as to the limits of Exhibit 1?

Mr. Hutcheson: That is objected to, if the Court please. The policy speaks for itself, a mere conversation with the agent does not change the limits of the insurance company's policy.

(Testimony of Meryl Kirkevold.)

The Court: I think that is true. I think I will sustain the objection.

Mr. Velikanje: Take an exception, Your Honor.

The Court: I do not mean to limit you to the point, if they discussed the identical matter here—that is, the agent that wrote the policy, but—

Q. Did the agent ever advise you what was covered in your [123] policy? A. No.

Mr. Hutcheson: Make the same objection.

The Court: Did the agent ever discuss with you these limits of liability?

The Witness: No.

The Court: Or, did you ever discuss with him anything in that connection?

The Witness: No.

Q. Did you make your reports to Mr. Orkney?

A. To his office, yes.

Q. To his office, and were those reports based upon the amounts as listed in—as you have testified to this morning on your proof of loss?

A. Yes.

Q. Or, this afternoon.

Mr. Hutcheson: Well, that is objected to, and move to strike the answer as entirely too broad and uncertain, indefinite, and also it is not the best evidence.

The Court: No use of arguing that phase of it, Mr. Hutcheson. The case is being tried to the Court without a jury. If it is irrelevant, I will so regard it, though right at this point, in this policy which is Plaintiff's Exhibit 1, and the [124] rider

(Testimony of Meryl Kirkevold.)

on it—the last one, appear to have a date subsequent to the fire.

Mr. Velikanje: That is correct, that is what we discussed this afternoon when it was admitted that was a rider that was put there subsequent to the fire.

Mr. Hutcheson: It is agreed that has no bearing on it.

The Court: Now, you may proceed.

Q. You testified, did you not, that you had no conversations as to the limits of this policy?

A. That is right.

Q. With Mr. Orkney or with anyone of the Home Insurance Company?

The Court: Was Mr. Orkney familiar with your place of business and your arrangement in it?

The Witness: Yes, he is.

The Court: And was before the fire?

The Witness: Yes.

The Court: Is your arrangement the same now as it was before the fire?

The Witness: No, the store has been completely remodeled.

The Court: And the reports, you say you made to him, were reports showing the amount of [125] merchandise you had in your storage from time to time?

The Witness: Yes, customers' goods.

The Court: How often would you make them?

The Witness: That was *to* made at the end of each month, a 30-day grace.

(Testimony of Meryl Kirkevold.)

The Court: Then, your premiums were based upon those reports?

The Witness: Yes.

The Court: That is all. I wanted to clear that up.

Q. Mr. Kirkevold, in your reports to the insurance company, was any segregation made of coats that were in "A" or in the part marked "store room," or upstairs? A. No.

Q. Were they all listed in one lump sum?

A. Total valuation.

Q. Total valuation? A. Yes.

Q. You were not asked to segregate?

A. No.

Q. Did you pay any additional premium on coats in the repair shop, or in the downstairs store room, or upstairs store room?

A. No, the rate was the same.

Q. You paid one premium on a lump sum, each month? [126] A. Yes.

Q. Was Mr. Orkney at your place of business prior to the fire?

A. Had he been there?

Q. Yes. A. Oh yes, he dropped in often.

Q. Had he gone through all of your store rooms?

A. Yes.

Q. Did the company or Mr. Orkney ever ask to see your receipts? A. What do you mean?

Q. The receipts issued to customers, or copies of them? A. Yes.

Q. Did you show them to him?

(Testimony of Meryl Kirkevold.)

A. He has seen them, yes.

Q. Mr. Kirkevold, were you short of help at this time? A. Yes.

Q. Had your brother previously been in business with you? A. Yes.

Q. Where was he at the time?

A. At the time, he had left to join the armed forces.

Q. And your coats backed up a bit on you at that time? A. They had.

Q. Were you having trouble getting additional help? A. Yes, we did. [127]

Q. Referring to your upstairs store room, was that a fire proof room? A. No.

Q. What were the walls made out of?

A. Plaster.

Q. And just outside of the wall, is that where you had your cleaning mechanism? A. Yes.

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. Mr. Kirkevold, referring first, to some of these customers' coats that you referred to here, in the case of Hattie Baur, you settled with her I believe for fifty dollars cash, did you?

A. Yes.

Q. And with reference to any particular fur garment, you are not claiming now against the defendant any more than you paid in any particular instance, are you, on your settlement with the customer? A. I did not get that.

(Testimony of Meryl Kirkevold.)

Q. I say, as to any particular fur garment, you are not claiming now against the insurance company any more than you actually paid to the customer, are you? [128] A. No.

Q. In other words, you paid her fifty dollars, and you are claiming fifty dollars against the company? A. Yes.

Q. Now, you used the expression, assuming the customer, of whom there were a number, who had a valuation stated on the receipt of two hundred and fifty dollars, we will say—some amount above two hundred dollars? A. Yes.

Q. And assuming that no certificate was issued to that customer, you used the expression that they paid an additional premium. Was any additional premium received by the Home Insurance Company as to those where no certificates were issued?

A. Well, the reports are based on the valuation, so if the customer values her coat at anything over two hundred dollars, that is reported to the company and they charge us with an additional charge.

Q. And how did that compare with the amount, was that the same, or a different amount as was paid to you by the customer?

A. On the company's charge?

Q. Yes.

A. The company's charge was not what the customer paid.

Q. In other words, they were on a different basis, entirely? [129] A. Yes.

Q. So that there was an additional considera-

(Testimony of Meryl Kirkevold.)

tion that you received if the customer got more than a valuation of two hundred dollars?

A. Yes.

Q. And when you stated that the customer paid an additional premium, you did not mean they paid additional premium that went in as such, the same amount, to the insurance company, did you?

A. No.

Q. In other words, that was the payment to you?

A. Yes.

Q. The amounts that were reported by you on your monthly report to the insurance company, were they the same as the amounts—that is, were they the total of the amounts stated on the receipts, or how did you arrive at that?

A. Yes, I would go through at the end of the month and total valuations on the receipts, and where valuations were not listed, I would put a valuation on that for the type of coat it was.

Q. In the cases where no valuation was stated on the receipt, how did you determine the amount that you reported? You just used your own judgment?

A. Just through my knowledge, yes, of fur.

Q. You did not make a practice of reporting two hundred dollars, did you? In other words, it varied? A. Yes.

Q. In such cases, where a certificate was issued, I believed there was thirteen certificates here—that is approximately correct, isn't it?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Where a certificate was issued for one amount and a receipt was issued to the same customer of the same coat for a different amount, which amount did you report to the insurance company?

A. I reported the two hundred dollars—or I mean, the amount that was on the receipt.

Q. The amount on the receipt. Did you say that Mr. Orkney examined these receipts prior to the fire?

A. Yes, he has seen them—well, ever since I have been in business over here.

Q. Well, when was the last time that Mr. Orkney, to your knowledge, examined these receipts before the fire?

A. Oh, it could have been three or four months before, at one time.

Q. As a matter of fact, practically all of the fur coats involved in the fire were received by you later than that, weren't they—that is, more recently prior [131] to the fire than three or four months?

A. Yes, they probably were.

Q. Referring to a few of these coats, I want to ask you about—referring to that of May Bobst, isn't it a fact that her coat was upstairs in the storage room on the second floor, and was not damaged? A. No.

Q. Did you tell Mr. McKinley that?

A. No, not that I know of.

Q. Are you sure that it was destroyed in the fire? A. Yes, it was.

(Testimony of Meryl Kirkevold.)

Q. As to the half a dozen or so of these receipts that are missing, do you know what became of them?

A. They were no doubt burned up. There was a lot of them burned.

Q. In those instances, when you settled with the customer didn't you obtain their original receipts?

A. We had them sign a release, and often times as it is now, a customer will misplace a receipt and we have them sign a release to the effect that they received their coat.

Q. Do you have any record other than the receipts themselves, as to the values stated on the receipts? In other words, did you keep a record in any other book, or anything of that kind? [132]

A. No, that was kept in a file and worked from those receipts, our copy.

Q. Did you keep any records of those values other than the receipts themselves?

A. No, that was our valuation record, as far as I remember. Yes, it was.

Q. It was your only valuation record?

A. Yes.

Q. It was not just clear to me, your testimony as to the Carmen matter. If you wish to refresh your recollection, I have no objection, but that receipt is missing at the present time, I believe.

A. What was the name?

Q. Carman, C-a-r-m-a-n.

(Testimony of Meryl Kirkevold.)

A. Yes, that was one of the receipts that I think was burnt.

Q. And do you know what value was placed on the Carman receipt?

A. A hundred and fifty dollars.

Q. And what would be your opinion as to the fair value of that garment at the time of the fire?

A. That was what I considered a fair value.

Q. That is what I am asking you, what would you say?

A. I would say that was a fair value.

Q. How do you come to that amount stated on that receipt? [133] Do you have any way of refreshing your recollection, at all?

A. Well, in that particular case she was a storage customer for two seasons, I think, prior to that had been in several times. Anyway with her coat, I just happen to know her coat.

Q. And you remember that amount, do you?

A. Yes.

Q. You stated that there were three coats that Mrs. Dawson had, and that one of them was not damaged in any way. Where was it, was it in the storage room on the second floor?

A. That was taken to the second floor.

Q. Prior to the fire? A. Yes.

Q. By the way, did you do anything to the coats outside of this workroom on the mezzanine floor, other than demoting them upstairs, I think you stated, that you did the demoting on the second floor?

(Testimony of Meryl Kirkevold.)

A. Well, they are cleaned. The ones that come in for demoting are demoted on the second floor, and—I mean, that is where it is done, but——

Q. Do you do or did you at that time, do anything else on the second floor, aside from storage other than demoting? [134] A. Cleaning.

Q. You did cleaning up there, also?

A. Yes.

Q. How large a space was used for that purpose, cleaning and demoting?

A. Oh, it was a sort of a ledge that was probably four feet wide and—oh, ten feet long,—something like that, eight or ten feet long.

Q. Was it at a landing, did I understand?

A. Yes, on a landing on the second floor.

Q. Was it near this storage room on the second floor? A. Yes.

Q. And about how many coats, as a rule, were kept there at that—— A. In the cleaning?

Q. Yes.

A. Well, very few, maybe two or six at a time—something like that.

Q. Just a very small number? A. Yes.

Q. Did you do any cleaning or demoting in this work room on the mezzanine floor?

A. No.

Q. With reference to the issuance of these certificates you of course were not a licensed insurance agent, [135] licensed by the state, were you? A. No.

Q. In other words, you were authorized by the

(Testimony of Meryl Kirkevold.)

Home Insurance Company to issue these certificates, based on the system provided in the main policy here, is that right? A. Yes.

Q. And how did it happen that in a number of instances you issued certificates and issued receipts on the same coat for different amounts?

A. Well, for instance, a customer would bring her coat in and she had the policy probably previous to the time of bringing her coat in, and so maybe not a regular girl would wait on her that was versed in that, that had a record probably of her policy, and one of the girls in the shop, or whoever it was, might have taken her coat in and just written it down like that.

Q. That is, just one of those mistakes in the office that happens? A. Yes.

Q. You never reported to the Home Insurance Company, did you, that certificates and receipts had been issued for different amounts on the same garments? A. No.

Q. And you never mentioned that to Mr. Orkney, had you? [136] A. No.

Q. Referring to the Erickson coat, the amount that you paid to the other insurance company—I think the General Insurance Company on that, was two hundred dollars wasn't it?

A. I am not sure about that.

Mr. Velikanje: I believe that is correct, Mr. Hutcheson, that is the one he made a settlement for two hundred dollars.

The Witness: That is right.

(Testimony of Meryl Kirkevold.)

Q. How much did you actually pay to Hazel Fiebelkom? The release, I might say, says valuable consideration without stating the amount?

A. Well, she is a girl that works in the shop.

Q. She was an employee of yours?

A. Yes, and we reimbursed her with a coat of equal value.

Q. The value I believe you said, was twenty-five dollars? A. Yes.

Q. Had she paid any charge at all prior to the fire? A. You mean, storage charge?

Q. Storage charge.

A. We just charged them what it cost to store it, is all—I mean, like so much a hundred. Of course, she did not have a hundred dollars. In a case like that, [137] where her valuation was low, we would not charge her.

Q. So, she did not pay any charge?

A. No.

Q. Your testimony was not clear to me as to Mrs. Del. Fleming. Did she had two coats that were destroyed? A. Yes.

Q. And what were the amounts stated on the receipts as to those?

A. I am not sure, but three and one hundred—or what was it, four hundred?

Mr. Velikanje: Just a moment, two hundred and one hundred.

Q. Both of those were destroyed, were they?

A. Yes, sir.

Q. And what was your testimony as to the fair,

(Testimony of Meryl Kirkevold.)

reasonable value of each of those at the time of the fire?

A. That was a fair valuation. As a matter of fact, it was under valued.

Q. Referring to Mrs. Fortier, if I understood you correctly you testified three hundred dollars, but your proof of loss as to hers in the amount you are claiming is two hundred dollars. Am I not correct about that?

Mr. Velikanje: That was a certificate, was it not?

Mr. Hutcheson: It was a certificate for [138] two hundred and twenty-five dollars, according to my——

Mr. Velikanje: Yes, that is what I have here.

Q. What amount was actually paid to Mrs. Fortier?

Mr. Velikanje: The receipt shows cash two hundred and twenty-five.

Mr. Hutcheson: Is that correct, cash of two hundred and twenty-five dollars?

The Witness: Yes.

Q. And if I understood you to testify that you are claiming three hundred, while you are claiming two hundred and twenty-five dollars on that one.

Mr. Velikanje: That is correct.

Q. And as I understand Gertrude Gannon's coat was not damaged in the fire. It was not there at the time of the fire?

A. Yes, it was.

Q. It was there?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. What is the value of the Gertrude Gannon coat?

A. I am not sure, a hundred and——

The Court: The witness testified a hundred and fifty dollars.

The Witness: A hundred and fifty dollars, something like that.

Q. The Pauline Gaudette coat wasn't there at the time [139] of the fire?

A. It was listed on the proof of loss, and later it was all right—it was not destroyed.

Q. Referring to the Hague coat, what amount are you claiming to that coat?

Mr. Velikanje: Mr. Hutcheson, may I show him the proof of loss so he can refresh his memory?

Mr. Hutcheson: Yes.

A. Three hundred and seventy-five dollars.

Q. Would you say that was the reasonable value of that coat? A. Yes.

Q. And there was no value on the receipt record?

Mr. Velikanje: That is correct.

Q. By the way, when a coat was brought in merely for repairs, as distinguished from storage, did you issue a receipt for such a coat?

A. Yes. Often times a customer would bring a coat in and just hang it there—literally hang it there saying that she would think about it and come back in an hour or so, and probably she did not get a receipt.

Q. But, in all other cases?

(Testimony of Meryl Kirkevold.)

A. Yes, we had an understanding and had them sign it as a rule so that there would be no slip-up.

Q. Well, you say you made a practice of having the [140] customer sign your receipts.

A. Yes.

Q. Did you do that as to these receipts here?

A. Yes.

Q. What was the reason that, in the considerable number of these instances, there, a receipt was issued but there was no value at all stated on the receipt. How did that happen?

A. Well, that was due probably to negligence on the part of any employee that just did not do it.

Q. Just a mistake made in your office?

A. Yes.

Q. There is no doubt but that the value was supposed to be stated on each receipt?

A. Yes.

Q. You are not making any claim in this case, are you, for any of the additional third party defendants whose names are: Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, Mabel G. Smith, and Erma Turnell—are you making any claim as to those coats?

Mr. Velikanje: I think I can definitely state that we are not.

Q. It is your understanding those were all covered by other insurance? [141] A. Yes.

Q. You made no settlements with any of those yourself? A. No.

Q. And you are not making any claim in the

(Testimony of Meryl Kirkevold.)

case, are you, for Hawk, or Lindsey, or Evans' garments, or Mrs. Harold Warner, or Mrs. Harry Rollis, if I am correct in this statement?

A. No—I mean, we are not making any claim.

Q. You are not making any claim on it?

Mr. Velikanje: Mr. Hutcheson, on your last remark as to claims, the only thing, Dorothy Riggs is a third party defendant now. She has not been defaulted out. We are not making any claim. She is making that claim herself.

Q. In your testimony, I did not get what the value was of Mrs. Jones' coat. Would you mind giving that figure again?

A. M. W. Jones, three hundred and fifty dollars.

Q. In your opinion was that a fair reasonable value of that coat at the time of the fire?

A. Yes.

Q. Referring to the Krause coat, how was it that there was a certificate issued only for a hundred and fifty dollars, and a receipt for—stating a valuation of two hundred dollars? [142]

A. That was one of those cases where a proper—well, the one that wrote the policies or the one that knew of the policies did not write the receipt when she brought the coat in,—just a mistake.

Q. A mistake in your office? A. Yes.

Q. You were aware, of course, of the provision in this policy that the company would not be liable as to any particular coat for more than the valua-

(Testimony of Meryl Kirkevold.)

tion stated on the receipt? You knew that, of course, didn't you?

A. You mean, on the—yes, because that is a report—the valuation that I reported, the valuation, you mean?

Q. No, I will restate the question. You knew, didn't you, that on this policy the insurance company was not liable as to any particular coat for more than the valuation stated on the receipt for that coat?

Mr. Velikanje: Your Honor, I am going to object to that. I think the policy will speak for itself.

Mr. Hutcheson: I am asking if he was aware of it.

The Court: That is true, except where he issued the special policy or certificate, as you [143] call it, signed by the company, and he signed it as their representative.

Mr. Velikanje: I mean, on the general statement as to whether he knew his liability was limited by something in there. He knew the policy would speak for itself, as to that.

Mr. Hutcheson: The policy does not. I think I have a right to ask him whether he was aware of that.

The Witness: Well, my thought is that the valuation that I reported, which I took from the receipt, was what I thought the insurance company would pay off on, if it paid off.

Q. Well, that is not just what I asked you, but

(Testimony of Meryl Kirkevold.)

do I understand that you knew and understood that the liability of the insurance company was limited to the valuation as to any particular coat that was stated on the receipt of that coat?

A. I think that is right.

Q. Will you give us again—I did not get it, what was the fair reasonable value of the Leach coat. That was a Northern Muskrat coat?

A. Leach?

Q. Yes.

A. Two hundred dollars. That was the maximum under [144] for the storage charges.

The Court: Mr. Hutcheson, however, that was a——

Mr. Velikanje: That was a case where she had a certificate.

Mr. Hutcheson: I believe she had a certificate.

Q. You would say the value of the coat was two hundred dollars?

A. Yes, in this proof of loss.

Q. By the way, a considerable number of the settlements that you made with the customers, were by giving or delivering to them coats as distinguished from cash, were they not—replacing coats rather than cash? A. Yes.

The Court: Now, in this Leach case, you gave, according to the record, you made in your direct testimony, you paid two hundred and fifty dollars in cash?

A. Yes, is that what it says on the release?

(Testimony of Meryl Kirkevold.)

The Court: Well, on the release I have before me, and it is admitted here.

Mr. Velikanje: Mr. Kirkevold, that is one she had a certificate policy of two fifty.

The Witness: And I gave her what?

The Court: Two hundred and fifty. [145]

The Witness: Yes.

The Court: Well, did you give her fifty dollars more than you thought the coat was worth? You just testified——

The Witness: I said two hundred dollars.

The Court: You thought two hundred dollars was the fair value of that coat?

The Witness: Oh, I think on that, we probably allowed her that amount on a coat, two hundred and twenty-five.

The Court: This indicated two hundred and fifty. You better get that straightened out. I want to know how much I can depend upon your values.

The Witness: Oh, it is cash two hundred and fifty dollars. I don't know why this two hundred dollars in here——

Mr. Velikanje: Didn't she have a certificate on this?

The Witness: Oh, that was the——we had two hundred dollars on the receipt, but she had this policy—this individual insurance policy which we had to make good, so we paid her cash, two hundred and fifty dollars.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: The question was, what was the reasonable value of that coat? [146]

The Witness: Let's see. Well, I would say that two hundred and fifty dollars would be the valuation, then, because when we write the insurance policy, we try to get as true a valuation as we can.

Mr. Velikanje: Then, your answer is two hundred and fifty, instead of two hundred?

The Witness: Two hundred and fifty dollars, yes.

Q. You want to change your testimony there that the value is two hundred and fifty dollars, rather than two hundred dollars? A. Yes.

The Court: Now, we are going to have to get along a little faster on these, because the Court can not possibly, if there are certain ones that you want to pick out, Mr. Hutcheson to attack, but if you want to attack them all generally, you will have to do it with your direct testimony, rather than take the time on cross examination because we will be here a week. I have got to finish this case tomorrow, and I am going to give you the whole of tomorrow, both of you, to complete the case, but I do not want it to go beyond that.

Mr. Hutcheson: Couldn't we possibly run Saturday forenoon, Your Honor? [147]

The Court: I have something else set on Saturday morning. No, we should finish this case, and I am going to work somewhat longer hours, but the issues are not so complex, as the Court sees them

(Testimony of Meryl Kirkevold.)

now, or since the proof of loss is admitted, are not on items, but are on values, but then we can not take values and make a case of each one of them. It is unnecessary to do that. If you want a description of each one of these—you want him to give one, and have your expert take that description and fix a value other than the values fixed here, the Court will permit that to be done, but to go on at length concerning each of these many items, it is not what we can possibly——

Mr. Hutcheson: I do not intend to do that, Your Honor.

The Court: Of course, an item such as where you just interrogated the witness is perfectly proper, whether he was confused or not, is for the Court to determine when he finally determines the case. I merely make that suggestion. We will work a little longer.

Mr. Hutcheson: Just a few other individual ones I want to ask you about.

Q. With reference to the Bee Metzger coat, you paid her [148] I think you testified, a hundred and forty dollars, and you and she agreed on that valuation rather than six hundred dollars did you?

A. That was a Hudson Seal coat, and replacement was not six hundred dollars, but we settled with her for a hundred and forty.

Q. And I say, you and she agreed on that valuation at the time of the settlement?

A. Yes, she signed the release.

(Testimony of Meryl Kirkevold.)

The Court: On your proof of loss, are you claiming more than a hundred and forty dollars?

Mr. Velikanje: We claim six hundred as a reasonable value of the coat.

Q. Well, are you claiming more against the insurance company in this case, Mr. Kirkevold, than the hundred and forty dollars that you paid as to that coat?

A. We have listed six hundred in the proof of loss.

Q. I did not ask you that.

The Court: The answer is self evident. He paid a hundred and forty dollars and claims six hundred dollars. He is claiming four hundred and sixty dollars more than he paid.

Mr. Hutcheson: Yes.

Q. When a coat was brought in for repairs only, as distinguished from storage, one other question there. [140] Was any charge made against the customer for insurance?

A. When the coat was brought in for repairs?

Q. Yes, for repairs only.

A. No, because it would be there only—supposedly be there a short while, time enough to do the work.

Q. And in your monthly report to the defendant company, did you include any such coats that were there for repairs only?

A. Yes, we always included the total valuation of all coats on hand.

(Testimony of Meryl Kirkevold.)

Q. Based on the values as you stated were on the receipts? A. Yes.

The Court: I want to know if you have any more items such as the one, Mr. Hutcheson pointed out to you where you settled for a given sum and then you put in your proof of loss the sum you thought measured the value of the article.

The Witness: Well, I would have to check that.

Mr. Velikanje: I think, Your Honor, the only other one was the Odell coat, which you referred to that he had a hundred dollars, and I believe that is the only one, except those that we had mentioned going through before.

The Court: I had this one. [150]

Mr. Velikanje: I think those two were both noted before, when we went through.

Q. Referring to the Odell coat, was any receipt ever issued on that coat?

A. No, that customer lived in—lived out of town, and she brought her coat in and was going to advise us when she wanted the work done.

Q. Were there any other—the coats involved in this case, as to which no receipt was ever issued other than Odell? A. Not to my knowledge.

Q. With reference to the Frank Souther coat, you claimed in the proof of loss two hundred and fifty dollars. As a matter of fact that was the fair value of the coat, was it not?

A. Well, I said two hundred—closer to two hun-

(Testimony of Meryl Kirkevold.)

dred and eighty. That would include taxes which had to be considered.

Q. Well, do you mean that when you made out the proof of loss you did not include the full fair reasonable value of the coat as of the date of the fire?

A. Probably on one or two coats at that time we might have missed, or under estimated a little.

Q. You went over the matter very carefully as to these amounts, and at the time you prepared the proof of [151] loss, didn't you?

Mr. Velikanje: I think, Mr. Hutcheson, when he went through there he remarked he would stand on the two hundred dollar valuation instead of two hundred and eighty.

Mr. Hutcheson: That is correct is it?

The Witness: Yes.

Mr. Hutcheson: Very well.

Q. And as to the Rex Tilton coat, did I understand that you are claiming only the seventy-five dollars that was actually paid for it?

A. Yes.

Q. Now, referring to the—I think this is the last individual one I want to ask you about, the Verd coat. As a matter of fact, that was a coat that you were manufacturing or making yourself, wasn't it?

A. Yes.

Q. And had it been manufactured at the time of the fire?

A. Yes, it was already to—I think just put the

(Testimony of Meryl Kirkevold.)

lining in. All the workmanship had been done, except putting in the lining.

Q. Except putting in the lining? A. Yes.

Q. What would you say was the fair reasonable—fair cash value of that coat in the condition that it was [152] just preceding the fire, or at the time of the fire?

A. Well, if we went on the open market and bought it, we would have to pay equivalent to that for that coat. It was a brand new coat. They were new skins in it.

Q. Equivalent of what? A. Three fifty.

Q. What was stated on the receipt as to the value of that coat?

A. The price of the skins, and this is a price including labor—price of skins including labor.

Q. What amount?

A. Well, I have forgotten how many skins she had at that time.

The Court: Well, do you have that receipt here?

The Witness: It must be.

Mr. Hutcheson: That is the receipt, apparently, that was burned.

The Witness: Seventy-six or more muskrats, around sixty-six muskrats. At roughly three dollars a skin, and then we had done all the work on the coat. The labor was all complete, except putting the lining in it.

Q. My question is now, if you can tell us what

(Testimony of Meryl Kirkevold.)

was the value stated on the receipt to that Verd coat, or [153] was there any value stated?

Mr. Velikanje: There was none stated.

The Witness: I doubt if there was a value put on it.

Q. Do you know what value if any you reported to the insurance company, or had you made any report to the company as to the coat?

A. Well, in a way I—there was a number of—the cost of the skins, up until I got the work done on the coat, and then the valuation was up to three fifty.

The Court: The question is do you know whether you made a report to the company?

The Witness: My final report would be three fifty.

Mr. Hutcheson: You say your final report would be there fifty, but had you included anything for the Verd coat in any report you made to the company?

The Witness: Yes, sir, because every thing I had in the work—I mean, in our customers merchandise was always reported—included.

Q. Do you have any record as to the amounts that made up the total you reported for the last report prior to the fire?

A. Well, I think we can get this from our agent. [154]

Q. Well, I don't mean the total. I mean the breakdown, the figures that went to make the total, did you make any list of that?

(Testimony of Meryl Kirkevold.)

A. No, just the total—total of the receipts—just totalled, and just put on one of the insurance company's report.

Q. That showed just the total? A. Yes.

Q. And you did not keep any lists showing the breakdown, how you arrived at that? A. No.

Q. Well, did you actually include a value for the Verd coat in a report to the company prior to the fire? A. Yes.

Q. And do you definitely remember how much you reported?

A. Well, my last report would be three fifty, to my knowledge.

Q. Do you definitely remember that?

A. Well, that is how I got my valuations.

Q. Do you definitely remember including that figure?

A. Yes, because it was included—they were all included.

Q. Well, do you specifically remember including any figure for the Verd coat?

A. Well, just like any other coat, whether I went through my files and the files were burnt to some extent, but [155] we always got our valuations from the files as to coats, and that were in storage, I mean, in the customers goods in the place.

Q. Well, you say from the files. You mean, from the receipts?

A. Yes, from the receipts.

(Testimony of Meryl Kirkevold.)

Q. But the Verd coat showed no value on the receipt.

A. Yes, it had some kind of a valuation on it.

Q. What value did it have on the receipt?

A. Probably had the three fifty valuation.

Q. You say it probably had. Do you definitely remember whether it did or not?

A. I think it did.

Q. But, you don't have any written record now showing the value of it? A. No.

Q. Referring to this diagram here, Exhibit——

The Clerk: Identification 5.

Q. (Continuing) Identification 5——

Mr. Hutcheson: Was it offered in evidence?

The Clerk: It was not.

Mr. Velikanje: I will offer it in evidence.

The Court: It will be admitted in evidence.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 5.) [156]

Q. Referring to Exhibit 5, you referred then to a work room. Will you write on Exhibit 5 the location of the work room, and will you make some marks there X's or whatever you wish to make, showing where the work tables were in that room?

A. Right along this wall (indicating), and right along this wall.

Mr. Hutcheson: Will you make a heavier mark. Will you write "W. T." up on that referring to work table.

A. And up here was a work bench, too.

(Testimony of Meryl Kirkevold.)

Q. Referring to this first one, farthest to the north, was that one long "L" shaped table, or several tables? A. No, there was several.

Q. Several tables? A. Yes.

Q. By the way, the exterior of the building, the upper side—the north side of the diagram, was the alley? A. Yes.

Q. There was no partition of any kind, was there, between what you refer to as the work room, and what you refer to as the store room?

A. Not this way. There was this way (indicating), and this way.

Q. Well, was there any partition of any kind separating [157] the—what you call the work room—from what you call the store room?

A. No, no permanent wall, no. There was an opening here (indicating).

Q. Well, there was no partition to it at all?

A. No.

Q. And nothing to show that they were two rooms rather than one, was there?

A. There were racks just made it that way.

Q. By the way, these racks were moveable racks, weren't they on four wheels?

A. Yes, except this one here was a permanent fixture. (Indicating.)

Mr. Velikanje: That was the one on the north side?

The Witness: Yes.

Q. You made—let's see, did you keep any coats waiting to be worked on that were on the mez-

(Testimony of Meryl Kirkevold.)

zanine here, in the part that you referred as a work room?

A. Yes, we had racks here where I have marked "A" and I have a small rack——

Q. Where you marked it "A," that refers to racks? A. Yes.

Q. I believe you have already stated what is shown on this diagram here, Exhibit 5, is on the mezzanine floor [158] of the store? A. Yes.

Q. And the Barnes-Woodin Store, the street address is 301 Yakima Ave.?

A. I used my address Barnes-Woodin Company. I am not sure, 301. It is right on the corner.

Q. It is so stated in the policy. Now, as you went up the stairs from the main street floor to the mezzanine floor, the stairs being indicated in the lower right-hand corner of the diagram, is that right? A. Yes.

Q. Then, you turn to the left to enter what you refer to here as the "A"? A. Yes.

Q. There wasn't any door at all, was there, at the head of the stairs?

A. No, we had an electric eye here, that when people crossed over here, that would ring a bell, if a person should happen to be there.

Q. However, that was an affair of electricity?

A. Yes.

Q. There was no door, or any thing closing off that passage way? A. No.

Q. Referring to the edge of the mezzanine

(Testimony of Meryl Kirkevold.)

floor, the [159] southern edge here (indicating), was there a rail along there at the south edge of the—what you referred to as the sales' room?

A. Yes.

Q. There was a railing. About how high?

A. I wouldn't say, twenty-four inches—twenty-six inches. I guess it was higher than that, about twenty-six or twenty-eight inches.

Q. Twenty-six or twenty-eight inches?

A. I imagine it is.

Q. In other words, there was no wall there?

A. No.

Q. And on the door on the west side what is referred to here as the sales' room, as I understand those were show cases there, weren't they from the floor? A. Yes.

Q. Did they go clear to the ceiling?

A. Yes.

Q. And then between what you referred to here as the sales' room and the work room, referred to here on Exhibit 5, there was this opening shown here, but there was no door?

A. No, just an opening.

Q. Just an opening, just about the way this part in the upper left-hand corner of the diagram—that was [160] merely a stairway, winding stairway going down to the west side of the building on North Third Street?

A. Up and down, it went up to the third floor and down to the street floor.

Q. Yes. Well, up to the second floor?

(Testimony of Meryl Kirkevold.)

A. Yes.

Q. Let's see, how many floors in that building, three floors?

A. There is three floors, and what they call a balcony.

Q. Three floors and this mezzanine floor?

A. Yes.

Q. A basement, is there? A. Yes.

Q. This floor that we are talking about now, is always referred to as the mezzanine floor, isn't it?

A. Yes.

Q. And then the next floor above this is always referred to as the second floor?

A. Second floor, that is right.

Q. At this time—at the time of the fire, there was a storage room or vault on the second floor—the next floor above this? A. Yes, sir.

Q. And about what was the size of that room at the time of the fire? [161]

A. Oh, I would say that was 15 by 12, something like that.

Q. Either you or the department store itself, have remodeled and changed the location and arrangement of your department since then?

A. Yes.

Q. By the way, there weren't any—you recall Mr. Sinclair, and also Mr. McKinley, two insurance adjusters for the defendant? A. Yes.

Q. And Mr. Sinclair worked on this matter first, and then later Mr. McKinley? A. Yes.

Q. And there wasn't any change, was there—

(Testimony of Meryl Kirkevold.)

no remodeling occurred until after Mr. McKinley had been there and inspected the premises?

A. Yes, sir, he had seen how the place was laid out.

Q. Before there was any change or remodeling?

A. Yes.

Q. Referring to the storage on the second floor, there were at the time of the fire, of course a very large number of fur coats in storage there, were there not? A. Yes.

Q. Just approximately how many were up there? [162]

A. Oh, probably five or six hundred. I am not sure.

Q. But in any event, a very much larger number were in the storage room on the second floor, than were on the mezzanine floor, that is correct, isn't it? A. Yes.

Q. And was any damage done at all to any of the coats that were in the storage room on the second floor? A. No damage.

Q. Were all of the fur coats—I am not referring to the sales' room, but in this work room or what you call the store room, were all of the fur coats that were there at the time of the fire damaged to some extent? A. Yes.

Q. Were all of them destroyed, or——

A. Well, there was several, one or two that we have listed here that we have taken back, like the Guadette coat and Warner coat. I think there are two or three that no damage was done.

(Testimony of Meryl Kirkevold.)

Q. Of the coats that you are making a claim for in this case, was there actually any salvage value as to any of those coats?

A. No wearable salvage value. There might have been a skin or two that possibly you could have used.

Q. The value would be relatively small for salvage? [163]

A. Yes, relatively small.

Q. You say there were not more than just a few coats on the mezzanine floor that were not damaged by the fire, is that right?

A. Yes, just what we have got stated here.

Q. Yes. Referring to the storage room on the second floor, you had a cooling apparatus?

A. We had circulating fans.

Q. During the summer, in Yakima, it gets pretty hot, doesn't it?

A. Yes.

Q. And it is desirable, isn't it in fur storage, as I believe you stated in your advertising, to store fur coats in a refrigerated place, or at least a place that is artificially cooled?

A. Well, we never in our advertising, I don't think, that we have mentioned freezing or anything, because we did not have a freezing temperature. We just had a cool conditioned place.

Mr. Hutcheson: I think you may be seated,—

Q. The cold storage place was the one on the second floor, wasn't it?

A. Yes.

Q. You didn't have any cooling apparatus, so far as the fur coats were concerned, on the mezzanine floor, [164] did you?

A. No.

(Testimony of Meryl Kirkevold.)

Q. In the summer time it got pretty hot there, didn't it? A. Some days.

The Court: Did you store coats on this floor, or did you just have them stored for the purpose of meeting the employment conditions?

The Witness: That is right, they were stored there till we could work on them, and get them up.

Q. But when you finally stored them for any degree of permanency, you took them upstairs?

A. Yes.

The Court: Are you about through now?

Mr. Hutcheson: Well, no, it will take me some little time.

The Court: Well, we will just have to speed this up, Mr. Hutcheson. There are certain points in this case the Court can take over the interrogation of the witness, but I don't want to do that. There is only a few points in this case that I want to have cleared up, and I could pass upon it then, and one of them of course is this question, whether or not this was a storage room within the terms and conditions of the contract of insurance. [165]

Mr. Hutcheson: That is a very important question in the case.

The Court: And the other is, if it were such, how much was outside of it, because it is estimated now, I believe this witness said about twenty or twenty-five per cent of the merchandise he claims a loss on was outside of this place where he kept them for repairs and checking up, isn't that right?

The Witness: Yes.

(Testimony of Meryl Kirkevold.)

The Court: And then, what he had in storage and paid insurance on upstairs was not—is not involved here because it was not affected by the fire.

The Witness: No damage, no.

Q. Now, just what do you mean by this segregation of this seventy-five per cent and twenty-five per cent? I know you mentioned that on direct examination.

The Court: The Court has that pretty well in mind, and if I am wrong I want him to correct me, that when a customer brought a coat in, instead of it being taken into this place you call a storage place on the mezzanine floor, it was put on a hangar on the outside for certain work or until you could reach a certain stage and put it on the inside, is that right?

The Witness: No, the coat was taken into [166] the storage room until we could take it out and work on it, and finish our work, and take it upstairs.

The Court: Then, the twenty or twenty-five per cent of your losses, by this fire, were those that were being worked on at the time.

The Witness: That is right.

The Court: And the others were waiting?

The Witness: Waiting work.

Q. In other words, twenty-five per cent *would* in what you call the work room, and seventy-five per cent in what you call the store room?

A. That is right.

The Court: And the twenty-five per cent in the work room, are those that come in earlier than

(Testimony of Meryl Kirkevold.)

those you say you had in this mezzanine store room?

The Witness: Yes.

The Court: And you tried to give precedence as to date when they brought them in?

The Witness: That is right.

The Court: I think we will have to adjourn to-day, but we will have to make better time than this tomorrow, and I am trying to point out to the counsel what the Court thinks, if we are going to have a hundred or a hundred and fifty items I will appoint a Master, because my time is too valuable, under [167] the circumstances. I have been away from my own court for six weeks. It will take days to do that.

Mr. Hutcheson: I will just ask the witness as to this:

Q. That is your signature, isn't it?

A. Yes.

Mr. Hutcheson: We offer in evidence, application for insurance.

The Court: What is it?

Mr. Hutcheson: It is the application for insurance.

Mr. Velikanje: I would like an opportunity to look it over. Is that all right with you?

The Court: That is his signature?

The Witness: Yes.

The Court: I think I shall admit it and the Court will be recessed until 9:30 o'clock tomorrow morning.

INLAND MARINE

Defendant's Exhibit "A"
PROPOSAL FORIM 2091-U
(Edition Dec. 4)

FURRIERS' CUSTOMERS POLICY

This Proposal must be completed and signed in duplicate.
It is essential that ALL QUESTIONS be answered FULLY. Quotations cannot be given on incomplete Proposals.

NOTE: Customer's Property wherever used herein refers to Customer's Furs or Customers' Garments trimmed with Fur.

Section One PROPOSER
1. Name Meryl Kirkebold dba Barnes-Woodin Fur Dept.
2. Principal place of business 301 E. Yakima Ave, Yakima, Wash.
3. Nature of business Fur coat sales

4. (a) Peak Values of Customers' Property (over all locations) during any two consecutive months of preceding twelve months were \$ _____ on _____ and \$ _____ on _____

(b) Name of present carrier of Furriers' Customers' Policy Northwestern Mutual Fire Ass'n.
Attaching date of such policy _____

5. LOSS EXPERIENCE:

(a) Has Proposer, during past five (5) years, suffered any loss, involving Customers' Property? no
(b) If so, give full particulars (on separate sheet if necessary) including name of insurer if any _____

6. Locations (all) used for storage of Customers' Property:

	Address	Floor	Building or Section	Operated by
A.	<u>301 E Yakima Ave, Yakima, Wash</u>	<u>2nd</u>		<u>Barnes-Woodin Fur Dept</u>
B.				
C.				
D.				

NOTE: Separate "Description of Storage Enclosure and Location" Rider must be completed for each Storage Enclosure, except where storage is at premises NOT operated by Proposer; then it may be omitted unless or until specifically requested by Company.

7. With respect to storage locations NOT OPERATED BY PROPOSER, specify,

(a) Those at which a separate storage enclosure is maintained for Proposer's exclusive use (this refers to an entire vault or room, not to a stall or other subdivision thereof) _____

(b) Any which may be in same building (but under a different street address) with Proposer's principal place of business _____

Section Two

INSURANCE
(Forms and Limits needed)

1. BASIC POLICY (Custody form only):

Limits of Liability:

(a) At Locations where Customer's Property is Stored

Location	In Storage Enclosure	Outside Storage Enclosure
<u>301 E. Yakima Ave</u>	<u>\$ 100,000</u>	<u>\$ 15,000</u>
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____

(b) At Locations Not Used for Storage

Proposer's Premises - - - \$ _____
While in Transit - - - \$ 5,000
At Any Other Location - - - \$ 5,000

2. OPTIONAL EXTENSIONS

(a) Certificates (is Certificate privilege desired?) yes

(b) Excess legal liability: \$ _____ limit any one garment, \$ _____ limit any one catastrophe.

Signing this Proposal does not bind the Proposer to complete the insurance, but it is agreed that the information contained herein and in the "Description of Storage Enclosure and Location" Rider(s) attached hereto shall be the basis of the contract should a Policy be issued. If any of the questions therein have been answered fraudulently, or in such a way as to conceal or misrepresent any material fact or circumstance concerning this insurance or the subject thereof, the entire Policy shall be void.

I/We have read the above and the "Description of Storage Enclosure and Location" Rider(s) attached hereto and agree that to the best of my/our knowledge and belief same fully represents the true state of facts.

Meryl W Kirkebold
Signature of Proposer
Date 8/20/76
Title owner

ATTACH DESCRIPTION OF STORAGE ENCLOSURE AND LOCATION RIDER(S) HERE.

DESCRIPTION OF STORAGE ENCLOSURE AND LOCATION

(To be attached to Furrer's Customer's Proposal)

Description of Storage Location

at

301 E. Yakima Ave

is as follows

1. STORAGE LOCATION GENERALLY:

Construction of Building (i. e., Frame, Brick, Mill, Reinforced Concrete, etc.)

B mass rag lighting

On which floor is storage enclosure located (i. e., basement, first, second, etc.)

- cond

2. STORAGE LOCATION AND STORAGE ENCLOSURE

BURGLARY PROTECTION (See Notes 1 and 2 below)

STORAGE
LOCATIONSTORAGE
ENCLOSURE

(a) Indicate (By Yes or No) whether the following are Protected by An Alarm System Connected With An Outside Central Station

(1) All Accessible Windows (Except Stationary Show Windows) - - -

no

(2) All Doors - - - - -

no

(3) All Transoms - - - - -

✓

(4) All Skylights - - - - -

✓

(5) All Other Openings - - - - -

✓

(6) All Ceilings - - - - -

✓

(7) All Floors - - - - -

✓

(8) All hall, party partition, and building walls (except building walls which are exposed to street or public highway, and except that part of any building walls which is at least two stories above roof of an adjoining building or other structure) - - - - -

✓

(9) State type, grade and certificate number - - - - -

✓

(b) Indicate (By Yes or No) whether the following are Protected By An Alarm System Connected With A Loud Sounding Gong or Siren on Outside of Building and Operated in Conjunction with Watchman Service Described in Section "C" Following

(1) All Accessible Windows (Except Stationary Show Windows) - - -

no

(2) All Doors - - - - -

✓

(3) All Transoms - - - - -

✓

(4) All Skylights - - - - -

✓

(5) All Other Openings - - - - -

✓

(6) All Ceilings - - - - -

✓

(7) All Floors - - - - -

✓

(8) All hall, party partition, and building walls (except building walls which are exposed to street or public highway, and except that part of any building walls which is at least two stories above roof of an adjoining building or other structure) - - - - -

✓

(9) State type, grade and certificate number - - - - -

✓

(c) Watchman Service

STORAGE LOCATION

(1) How many Private Watchmen are maintained, at one time, within the premises - - - - -

one

(2) Are all such Watchmen on duty at all times when premises are not regularly open for business - - - - -

yes

(3) If not, when are such Watchmen on duty - - - - -

no

(4) Do such Watchmen signal to a Central Station at least hourly - - -

no

(5) If not, do such Watchmen register on a Watchman's Clock, at least hourly

no

NOTE (1) Accessible windows are those windows not more than 18 feet above the ground, or roof of an adjoining building or projection, or from an extension, or from a ledge or fire escape or other structure. Windows above the first story of the building and which front on a public thoroughfare and which are more than 18 feet above the ground are not considered accessible.

NOTE (2) A Police Station may be classed as a Central Station provided there is a regular policeman on duty therein at all times.

CONTINUED ON REVERSE SIDE

4

3. STORAGE ENCLOSURE ONLY:

(a) Size - - - - - Width 20 Length 20 Height 12
 (b) Number of Openings - - - - - Doors Windows Vents.
 (c) Construction of Walls, Floor and Ceiling:

Material	WALLS Thickness	FLOOR Thickness	CEILING Thickness
Wood and/or Plaster Board - - - - -	<u>6</u> inches	<u>12</u> inches	<u>12</u> inches
Cement or concrete blocks - - - - -	inches	inches	inches
Hollow Tile - - - - -	inches	inches	inches
Brick - - - - -	inches	inches	inches
Plain Concrete - - - - -	inches	inches	inches
Reinforced Concrete - - - - -	inches	inches	inches
Granite or Stone - - - - -	inches	inches	inches
Steel - - - - -	inches	inches	inches
Steel Lining - - - - -	inches	inches	inches
	inches	inches	inches

NOTE: If all walls are not of same construction, classify walls as Nos. 1, 2, 3, and 4, and designate type of construction of each.

(d) Description of Doors of Storage Enclosure

- (a) State type (ordinary, refrigerator, fire or vault) - -
 (b) Name of Manufacturer - - - - -
 (c) State classification of Underwriters Label - - - - -
 (d) If refrigerator or fire door state thickness - - - - -
 (e) If Vault Door
 (1) State thickness of steel exclusive of bolt work - -
 (2) Is door equipped with combination lock? - - -
 (3) Lock Manufacturer's Name and Number - - -
 (f) If not equipped with combination lock, describe lock -

OUTER DOOR	INNER DOOR
<u>ordinary with steel lining</u>	
	inches inches
<u>no</u>	inches inches
<u>key lock - Sargent</u>	

Mayl W. Pickersold

Signature of Proposer

Date 8/20/42

THIS SECTION MUST BE COMPLETED AND SIGNED BY THE COMPANY

Give promulgated fire co-insurance rate in each case, i. e., 80%, 90% or 100%. 100%
 Fire Contents Rate (Furs) at storage premises 548 Subject to 80 % Co-Ins.
 outside of vault 466 Subject to 100 % Co-Ins.
 Fire Contents Rate (Furs) if published, in vault at storage premises - - - - -

Date 8/20/42

James W. Calkins
 Signature of Company Representative

CLERK
PAUL P. O'BRIEN

JUL 8 - 1946
 FILED
 FROM THE NINTH CIRCUIT
 UNITED STATES COURT OF APPEALS
 11876

910
 11

Cur-210

Defendant's Exhibit B-1

KIRKEVOLD FURS

YEAR 1945

PROFIT AND LOSS

SALES

87508.53

Cost of Goods Sold

Inventory 1-1-45	17590.34
Purchases	55939.88
Freight	<u>330.52</u>
	73860.74
Less Inventory 12-31-45	<u>22862.27</u>
Cost of goods sold	

50998.47 ^{58.22}
36600.06 ^{41.78}

Deductions:

Salaries	9435.80
Rentals	10883.40
Insurance	2564.14
Supplies	591.80
Repairs	32.60
Legal	56.97
Advertising	1902.00
Tel and Tel	70.44
Dues and Subscriptions	15.27
State Business Tax	304.87
Industrial Insurance	29.84
Social Security	308.17
Depreciation	<u>82.75</u>

26278.05 ^{58.22} ^{41.78}

Net Profit from operations
Insurance Income on fire loss

10322.01 ^{11.78}
5890.00

Net Income

16212.01

Distribution of Profits

Erle Kirkevold	4053.00
Meryl Kirkevold	<u>12159.01</u>

16212.01

EXPLANATION OF DEPRECIATION

KIND OF PROPERTY	ACQD	RATE	COST	PREV YEARS	THIS YEAR
Furniture and fixtures		10%	250.60	25.06	25.06
" " "	1944	10%	168.78	16.78	16.88
" " "	1945	10%	<u>4080.62</u>		<u>40.81</u>
			4500.00	41.93	82.75

(Whereupon, application for insurance referred to was then received in evidence and marked Defendant's Exhibit A.)

(Whereupon, adjournment was then taken until 9:30 o'clock a.m. March 8th, 1946.) [168]

March 8, 1946, 9:30 o'clock a.m.

The Court met pursuant to adjournment, all parties present.

MERYL KIRKEVOLD

resumed the stand for further examination and testified as follows:

Cross Examination (Resumed)

By Mr. Hutcheson:

Q. Mr. Kirkevold, were there any work tables or anything other than racks for fur coats in the part of this room in which you call the store room?

A. On the back end there was shelves that we kept fur pieces.

Q. Shelves that you kept fur pieces?

A. Yes.

Q. That were owned by you? A. Yes.

Q. Part of your stock? A. Yes.

Q. Were there any tables or sewing machines, or anything of that kind in this westerly part of the room there, [169] where you have the store room? A. No.

Q. At the time of the fire, there was an abnormally large amount of fur coats on the mezzanine floor, wasn't there? A. Yes.

Q. Why was that, were you short handed, or——

A. That was one of the reasons we were short

(Testimony of Meryl Kirkevold.)

handed, but it had just started in the storage season. The weather I imagine, had got warm enough so people started bringing them in at that time, because that was early—the starting of our season.

Q. Ordinarily of course, you would not have had that many fur coats on the mezzanine floor, would you?

A. Oh, all during the season we have coats coming in from then on through the season, there would be that many coats, or more.

Q. But, you say this was an abnormal amount to have?

A. It was not abnormal. It was early in the season. That is what happened when the fire started, all these coats were there and then throughout the season the coats were there.

Q. There isn't any reason is there, that you can't do repair work on a fur coat after it has been in the second floor storage room—you get what I mean, [170] in other words, the middle of the summer take it out of the storage room upstairs and do repair work on it, and return it to the storage room? I understand you did not do it that way, but that can be done, can't it?

A. That can be done. The reason we didn't do it that way, is because when the coat went in the second floor store room, I wanted them cleaned and fixed up before they went in there. I just did not want to stick in a lot of coats as they came in. They had to be gone over in that way. I kept my second floor storage room clean.

(Testimony of Meryl Kirkevold.)

Q. How many employees did you have there at the time of the fire?

A. I think there were five persons there.

Q. Five persons. Did one of them work in what was referred to as the sales room? A. Yes.

Q. And four of them worked in the work room?

A. Yes.

Q. Were you there yourself the day of the fire, before the fire occurred? A. What was that?

Q. Were you there yourself the day of the fire, before the fire occurred? A. No. [171]

Q. I believe you stated yesterday that you were farming at that time, were you? A. Yes.

Q. And how long had you been farming?

A. Oh, for six or eight months, something like that.

Q. You were serving your country, on the food crop, in other words? A. Yes.

Q. Referring to the second story storage room on the second floor, ordinarily there wouldn't be anybody in that room, would there?

A. In where?

Q. There wouldn't be anybody ordinarily in the storage room on the second floor. In other words, now and then, an employee might take in a fur coat or two, but generally speaking that room would be vacant as far as human beings were concerned, isn't that right? A. Yes.

Q. Was it ordinarily kept locked at that time?

A. Yes, during night times, not always in the daytime.

(Testimony of Meryl Kirkevold.)

Q. At the time of day that this fire occurred, was about 5:40, wasn't it, or thereabouts, p.m.?

A. Yes, sir.

Q. The closing time of the store was 5:30 p.m.?

A. Yes. [172]

Q. And this was just a few minutes later, probably started from somebody's cigarette thrown away, don't you suppose?

A. I am not sure. I was not there. They say it was wiring.

Q. Anyway, you don't know what was the cause of it?

A. No.

Q. How long had you engaged—how long had you been owner of the fur business—that is, your own boss?

A. Since March—or any fur company?

Q. Barnes-Woodin?

A. Since March, '42.

Q. And prior to that had you owned your own fur business, or had you been an employee?

A. I had been in business here in town prior to that.

Q. I see, and when did you first go into the fur business for yourself?

A. In 1938.

Q. '38, and where were you located before that?

A. Over Carothers Jewelry Store.

Q. You mentioned yesterday that occasionally there might be some fur coats in the basement. There would be very few in the basement, wouldn't there? That is, that was the shipping room, was it?

A. Shipping room, yes. [173]

(Testimony of Meryl Kirkevold.)

Q. And they did not remain in the basement—that is, if they went down there they were shipped rather promptly, weren't they?

A. Yes, they probably were.

Q. In other words, they would really be in transit if they were in the basement, wouldn't they? That is, part of the shipping process?

A. Well, unless they happen to come in late in the evening and stayed there overnight, or waiting for shipment, or something like that.

Q. Yes. Was there any part of the entire Barnes-Woodin Store or where fur coats of customers were kept, outside of the storage room on the second floor, and outside of this room on the mezzanine floor? Those were the only two places, weren't they, in the entire store where fur coats of customers were kept?

A. On the mezzanine and on the second floor?

Q. Yes.

A. Well, in the shipping room there could be customers' coats.

Q. Well, that is what you just referred to?

A. Yes.

Q. Just the one or two there, and they would be shipped within twenty-four hours, is that right?

A. Probably that would be the way it would be.

Q. And that is all, isn't it? Those were the only parts of the store? A. Yes, as far as I know.

Q. I noticed in Exhibit 6 you advertised that customers' fur coats were insured against moths. Of

(Testimony of Meryl Kirkevold.)

course, you knew that this policy did not cover moth damage, didn't you?

A. Well, our advertising was just merely the fact while we had the fur in safe keeping there wouldn't be any moths get into it.

Q. That is what you meant. By the way, you didn't have any other insurance that you procured yourself, covering customers' coats, did you other than this policy?

A. Well, not to my knowledge. I just took my insurance from Hargraves and Orkney.

Q. Well, this was the only policy you held, so far as customers' coats was concerned, wasn't it?

A. As far as I know.

Q. Did Mr. Orkney suggest at one time or another that, referring to this ten thousand coverage, outside of storage rooms he suggested that be increased from what it was originally, \$5,000 to \$10,000, didn't he? Do you remember that?

A. I don't remember that he did.

Q. Do you recall whether you told him you wanted the [175] ten thousand as to that classification?

A. I know I did not. I mentioned it, but I don't remember when it was done, even.

Q. By the way, the situation—the arrangement of rooms and the method of carrying on the fur department and all of that, was the same, wasn't it, when this insurance was taken out—applied for and issued in August, 1942, as it was at the time of the fire?

(Testimony of Meryl Kirkevold.)

A. No. After I came in—after I had been in there, I think it was in '43 that we did our own remodeling in the back of the shop there.

Q. Just what changes, if any, did you make in '43?

A. Well, I built this main storage rack in the back—in this storage room in the back part of the mezzanine, and cleared off space so that I could put more racks in there.

Q. That was all you did, you just added additional racks there? A. Put up partitions.

Q. Well, what partitions did you put in there in '43? A. The partition on the west side.

Q. Will you just point out on the Exhibit?

A. This partition in here (indicating).

Mr. Velikanje: That would be the south side, wouldn't it? [176]

The Witness: South Side.

Q. Marked "P" here (indicating)?

A. Yes.

Q. There were a considerable number of racks in that room in 1942, were there?

A. No, prior to my coming there that was an office space of the newspaper, the man that wrote the ads used to have offices back in there, and we—

Q. You say—I am not interested in that. You say you came there in March, 1942? A. Yes.

Q. You had racks for keeping fur coats that you worked on in that room, didn't you, in March, 1942, on? A. That space was not large enough.

The Court: Speak a little louder.

(Testimony of Meryl Kirkevold.)

The Witness: The space was not large enough. There was a little room where you could walk back, but it was not large enough to have coats or racks or anything in there.

Q. Wasn't the size of the room the same in August, 1942, as it was at the time of the fire?

A. No.

Q. Just explain what difference there was.

A. Well, this partition was put in there.

Q. Well, yes, you have told us that, but everything north [177] of the partition remained just the same in August, 1942, and at the time of the fire, didn't it? A. I don't quite understand.

Q. Well, the general arrangement of the room there, you told us you put in a partition there some time in '42, other than that everything north of the partition, the arrangement of the room and so forth remained the same, didn't it, in August and at the time of the fire?

A. No, because we put in the racks

Q. You put in some additional racks?

A. And shelves in the back.

Q. There were some racks already there, weren't there, in August, 1942?

A. There could have been a rack in there, but there wasn't—we put in the racks permanently, the long rack along the ceiling and the shelves and fixed it so we could put racks in there.

Q. Well, there were racks there, however, in the spring of '42, weren't there?

A. No, because we did not need that space.

(Testimony of Meryl Kirkevold.)

Q. Isn't it a fact that in 1942 the first year you were there, that fur coats that were waiting to be worked on, that you kept them in that room the same as you did in '44? [178]

A. There were probably coats back there at different times.

Q. Well, just answer my question. Isn't it a fact, to be fair, Mr. Kirkevold, didn't you keep fur coats that were waiting to be worked on in that room on the mezzanine floor in '42, the same as you did in '44? A. No.

Q. Well, where did you put them in '42?

A. We had coats hanging all over. This was all different. The plan was different in here. As far as hanging—hanging space and work tables.

Q. The room itself, other than the partition, and you say you added some additional racks—other than that, the room itself was the same, wasn't it, in '42 and '44? A. No, we changed the room.

Q. What other changes did you make? Tell us every change you made.

A. Well, this partition was not up there.

Q. You told us that.

A. Well, I put these racks up here, and I put the shelves back here.

Q. Anything else?

A. No, I can't think of anything.

Q. Now, you have not answered my question yet. Isn't it a fact that you used the same method in 1942 and 1943 [179] as you did in 1944, namely that fur coats of customers that were waiting to be re-

(Testimony of Meryl Kirkevold.)

paired or worked on, you kept them there in the mezzanine floor, rather than in the storage room on the second floor?

A. Oh, we always had coats hanging all over down here.

Q. You always did, and that was true in '42, also? A. Yes.

Q. And the coats that were hanging there in 1942 and '43, were coats that were waiting to be worked on the same as in '44. That is right, isn't it?

A. Well, that could be, yes.

Q. Well, that is a fact, isn't it? A. Yes.

The Court: Well, was this room used for any purposes other than hanging coats that were waiting processing in '42, before the partition was built? Was any other use being made of the room?

The Witness: By us?

The Court: By you or anybody else.

The Witness: Well, I don't know whether we have worked back there or what we did back there at that time.

The Court: Well, did anybody else use it?

The Witness: No outsiders that I know of.

Q. What was it you said about writing copy, or something? [181]

A. Oh, they had a newspaper office in there, yes.

The Court: Well, that is what the Court is asking you.

The Witness: Well, that was the time before.

(Testimony of Meryl Kirkevold.)

The Court: Prior to the time you made the changes you testified to?

The Witness: Yes, sir.

The Court: Did they continue in there after you took a lease on the property?

The Witness: No, they moved to the second floor.

The Court: They moved out after you took the lease?

The Witness: Yes.

The Court: All right now, proceed. Let's get along.

Q. In other words, that ceased in March, in 1942, when you moved in there? A. Yes.

Q. After the fire, you increased the amount of the coverage outside the storage room, didn't you, as shown by that rider?

A. I think Mr. Orkney did it, yes.

Q. At your request? [180]

A. Well, he suggested it.

Q. You consented to it? A. Well, yes.

Q. I did not ask you this yesterday. The original receipt you always delivered it to the customer at the time they left their coat there, didn't you?

A. Yes.

Q. And then you kept a copy of the receipt?

A. Yes.

Q. And these receipts never were sent to the insurance company, were they?

A. These customers' receipts?

Q. The customers' receipts. A. No.

(Testimony of Meryl Kirkevold.)

Q. I assume that you made some profit on the replacements of the coats, didn't you, for the customers? That is you paid for them of course at the wholesale price?

A. We purchased the coats at a wholesale price, but had to sell them at retail.

Q. Yes, so that you had a favorable margin there between the two prices on these replacements of coats? A. I wouldn't say it was favorable.

Q. Well, there is of course a substantial difference, isn't there, on fur coats between the wholesale price and retail price? [182]

A. Yes.

Q. And the replacements were made generally speaking, on the basis of the retail price, weren't they? A. Yes.

Q. Referring to the payment here, it is admitted in the pleadings that eighty-two hundred dollars has been paid by us to you. The first \$5,000 was paid October 30th, 1944, was it not? Is that date approximately correct?

Mr. Velikanje: I will have to look up my figures on that.

The Witness: I am not sure.

Q. And the other payment of thirty-two hundred dollars, I believe, on January 15, 1945?

Mr. Velikanje: I think that is approximately so.

Mr. Hutcheson: Will you check?

Q. You never notified the insurance company at any time, did you, Mr. Kirkevold, of the fact that

(Testimony of Meryl Kirkevold.)

on some of these receipts your employees omitted to write any valuation? A. No.

Q. You never notified them of that?

A. No.

Q. And you never notified them that in some instances [183] certificates were issued for different amounts than the value stated on the receipts. You never notified them of that, did you?

A. Well, by just writing a policy.

Q. I say, you never notified the Home Insurance Company of that, did you?

A. That we wrote the policy?

Q. No, I will repeat it. You never notified the Home Insurance Company before the fire that you had issued certificates for different amounts to some of these customers than the values stated on their receipts?

A. Well, the only way I would notify them would be by sending in a copy of it—their copies of the policy that we wrote.

Q. You sent them copies of the certificates?

A. Yes.

Q. But not copies of the receipts?

A. No, no.

Q. And so you never did notify them, did you, before the fire that there was a difference in the amount as between the certificates and receipts?

A. No.

Q. You were authorized by the insurance company, weren't you, to issue these certificates only in

(Testimony of Meryl Kirkevold.)

the accordance [184] with the provisions of this basic policy—the principal policy here?

A. Well, yes.

Mr. Hutcheson: Are those dates correct?

Mr. Velikanje: The one date is October 30th and the other one is February 6th.

Mr. Hutcheson: October 30th, 1944, was the \$5,000 payment and February 6th, 1945, the thirty-two hundred dollar payment?

Mr. Velikanje: That is correct.

Q. At the time of the fire, you told a reporter of the Yakima Daily Republic, didn't you, that the fire occurred in the alteration room of the store, of the fur department of the store?

A. Not to my knowledge, because I did not know anything about the fire. I mean, I did not know where it started.

Q. How long after the fire were you there?

A. Oh, when the fire was out. Well, I was probably there half or three-quarters of an hour afterwards.

Q. Was it still burning at that time?

A. Well, it was heat there. I don't know whether there was any flame.

Q. Well, it was very evident that the fire was in the work room, wasn't it? [185]

A. Well, that is where all of the damage was done.

Q. Yes, but you did not tell them, that that occurred in the alteration room?

A. Not that I know of. I don't think I did.

(Testimony of Meryl Kirkevold.)

Q. You noticed, of course, that was in the Republic the next day. The article said it occurred in the alterations room of the fur——

Mr. Velikanje: I object.

The Court: Objection sustained.

Q. In the application which you signed, defendant's Exhibit "A," you noticed this, didn't you, paragraph 6 say:

"Locations all used for storage of customers' property."

Then there is a blank to be filled, address, 301 East Yakima Avenue, Yakima, Washington, floor second, operated by Barnes-Woodin Fur Department," that is correct, isn't it?

A. Well, I don't remember.

Mr. Velikanje: I think the instrument speaks for itself, Your Honor.

A. I see that.

Q. In other words, in the application you told the insurance company the only place where customers' furs were stored, was on the second floor, is that right? [186]

A. Well, I just talked with Mr. Orkney and told him I wanted insurance, and I don't know what he did.

Q. Never mind that. That is what is stated in——

A. That is what it says there, yes.

Q. And you signed it? A. Yes.

Q. You read it before you signed it?

A. I probably glanced at it.

Q. And then——

(Testimony of Meryl Kirkevold.)

The Court: Who wrote the application?

The Witness: Mr. Orkney, probably.

Q. And then a little further down on the same page it says:

“Basic policy, custody form only: limits of liability. A. At locations where customers’ property is stored.” Then it says “In storage enclosure one hundred thousand. Outside storage enclosure ten thousand.”

It looks like a five thousand is changed to a ten thousand, doesn’t it? A. Yes.

Q. And you signed that, so stating, didn’t you?

A. Yes.

Q. That the coverage was to be so limited, and then on the second page it says, “Storage location generally: [187] Construction of the building” and so forth, and then “On which floor is storage enclosure located, that is, basement, first, second, and so forth” that says “second.”

A. That says “second,” yes.

Q. It does not say anything about the mezzanine floor, does it, anywhere? A. I don’t see any.

Q. Then, on the other side of the last page—by the way, that is your signature also, isn’t it?

A. Yes.

Q. You signed this, and “Storage enclosure only; size, width 20, length 20, height 12, doors,”—that, of course, referred to the room on the second floor, doesn’t it? Wasn’t that the size of the room?

A. Approximately, I would say.

Q. Then, “Wood or plaster board walls, thick-

(Testimony of Meryl Kirkevold.)

ness 6 inches, floor thickness 12 inches." That refers to the storage room on the second floor, doesn't it?

A. Well, I couldn't say exactly, because I never measured it.

Q. Well, would that be approximately correct?

A. No doubt it was approximately correct.

Q. That was not the size of this room on the mezzanine that we have been discussing, was it? [188]

A. No.

Q. You had a number of—you are acquainted of course with the two adjusters, Mr. McKinley and Mr. Sinclair? A. Yes, sir.

Q. And of course you—after the fire you talked to both of them a number of times?

A. Yes.

Q. And you had a number of conversations with Mr. Sinclair, you recall, don't you? A. Yes.

Q. And isn't that a fact that you stated in substance to Mr. Sinclair during those discussions after the fire, that you did not have enough insurance coverage under this policy to cover the loss of the customers' coats in this fire?

A. I never——

Mr. Velikanje: Your Honor, I am going to object to that. I do not think it is material to this. The insurance company has requested and secured a waiver in this matter, a non-waiver agreement to be used for the purpose of communication and settlements without either side incurring liability, and

(Testimony of Meryl Kirkevold.)

I do not believe now they can come in and use such conversations whether that is correct or not, [189] and use that as a basis—as a defense in this action.

Mr. Hutcheson: The effect of a non-waiver agreement, the company does not waive anything by investigating the fire.

Mr. Velikanje: I think it works both ways in that, Your Honor.

The Court: Let's proceed. I will have to overrule the objection. It may or may not have value in impeaching the credibility of this witness.

Q. You may answer.

A. Not to my knowledge.

Q. And didn't you also state to Mr. Sinclair in those conversations that you wondered whether Mr. Orkney, the agent, could arrange it so that the insurance company would make up the difference, or the shortage between the amount of your insurance coverage and the amount of your loss on customers' coats? A. I can't recall saying that.

Q. You can't recall that, and didn't you further state to him that in any event the profits you would make on replacing coats as distinguished from cash settlements with customers, to some extent would reduce your loss by reason of your not having sufficient insurance coverage to take care of the loss of customers' coats? [190]

A. I can't remember saying anything like that.

Q. You can't remember? A. No.

Mr. Hutcheson: That is all.

(Testimony of Meryl Kirkevold.)

Redirect Examination

By Mr. Velikanje:

Q. Mr. Kirkevold, on these certificates that you issued, *when* these parties paid additional premium for those certificates, did they not?

A. Yes.

Q. Was that certificate money then turned over to the insurance company?

A. Yes, that was sent in additional to the monthly report.

Q. That was sent in addition to the amount you had to send in on the basis of your monthly report?

A. Yes.

Q. Now, you stated there wasn't anything on the second floor besides your upstairs storage room, is that correct?

A. Well, the store had part of the second floor, and there was——

Q. What else was on that second floor?

A. There was store rooms, a drapery room, drapery workshop [191] rooms.

Q. Where was the drapery workshop room?

A. Well, that was right along side of this storage room on the second floor.

Q. Had you ever read this policy over prior to the fire? A. No.

Q. Had you relied only upon Mr. Orkney?

A. Yes.

Q. Mr. Orkney was the agent of the Home Insurance Company? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Now, you testified there was nothing in the doorway to this storage room. What about this door between the sales' room *and it* went back to the work room?

A. Well, drapes hung across the door.

Q. That was closed off by drapes?

A. Yes.

Q. The door to the stairs, what was in that door?

A. That was a door that was kept locked.

Q. That was kept locked? A. Yes.

Mr. Hutcheson: Just so the record is clear, that refers to the rear door—the rear stairs in the upper corner of the——

Mr. Velikanje: That went on to the stairway, yes. [192]

Mr. Hutcheson: There are two stairs there. I think the record should be clear.

Mr. Velikanje: Well, it went to what we all term the back stairs.

Q. You say that was kept locked. That was kept locked at night? A. Yes.

Q. In the daytime you used it to go back and forth between your two store rooms and your cleaning room? A. Yes.

Q. When were these fur racks downstairs built?

A. Well, in '43 our business so increased that we had to have the room.

Q. Had you prior to that time been bothered by coats piling up on you and anything prior to storage? A. No.

(Testimony of Meryl Kirkevold.)

Q. You had not had that problem?

A. No.

Q. Did you in '43 also build in or put in these movable racks that you had in there?

A. Yes.

Q. And then your examination, or testifying in Mr. Hutcheson's cross examination, you did not mention anything about those racks. When were those put in there? [193]

A. Those were put in there in '43. We got all of the racks we could get at that time. We needed the hanging space.

Q. Prior to that time this was not used as a store room? A. No.

Q. Did the Barnes-Woodin Company use any of that space that is now your mezzanine store room for storage of things prior to 1943?

A. Well, along the catwalk—they kept the catwalk for themselves to get back to a room along the side of the building.

Q. But you built that partition up along the catwalk in '43? A. Yes.

Q. But, I mean up to the time that you built that partition, did they use any of this space between the time—

A. Yes, there was all kinds of display things they used in windows, little tiny racks for hanging blouses on, and things in the windows, and forms were all back in and around there.

Q. Up to when?

(Testimony of Meryl Kirkevold.)

A. Up until the time we were—we had to have the space for hanging.

Q. That was in '43? [194] A. Yes.

Q. Then at the time, this application was made out that Mr. Hutcheson has referred to, the Barnes-Woodin Company was using this as a storage space for theirs, is that right? A. Yes.

Q. Did you testify that the handwriting except for the signature on that application, is Mr. Orkney's? A. Well,—

Q. Is that in your handwriting?

A. No, that is not in my handwriting.

Q. Do you believe it is in Mr. Orkney's?

A. I would say it was.

Q. He handled all of your insurance?

A. Yes.

Q. Mr. Kirkevold, let us say that a coat was brought in for repairs, and a woman would not come back to get her coat for a month after you repaired it. Where would that coat be stored?

A. I would put it right in the back, in the storage room.

Q. In the store room? A. Yes.

Q. It would not be taken to the second floor, is that correct? [195] A. No.

Mr. Velikanje: I believe you say you want this one separate.

Mr. Hutcheson: Yes. There is one I want to object to its materiality, yes.

Mr. Velikanje: Mark these.

The Court: Mark them as an Exhibit.

(Testimony of Meryl Kirkevold.)

The Clerk: Plaintiff's identification 9.

The Court: You are not offering that one.

Mr. Velikanje: I will offer that one, yes, but Mr. Hutcheson will want to object to that one.

The Court: I see.

Mr. Hutcheson: I have no objection to 9.

Q. Mr. Kirkevold, I hand you a group of pictures marked Exhibit 9 for identification, consisting of 10 pictures. Are those pictures taken at the scene of the fire? A. Yes, they are.

Mr. Velikanje: I wonder, Your Honor, if we can mark these on the back "A," "B," and "C" on the separate pictures, in showing them on the map?

The Court: I was just thinking of saving time, if they were all pictures taken there, and that is the reason I suggested they be put in, since this is being tried to the Court without a jury, as a [196] group exhibit, and I do not want to take too much time in developing various features of them. If there is some particular feature you desire to point out. How are you designating them, plaintiff's exhibit, "A," "B," and "C"?

The Clerk: I will mark this 9-A for the purpose of——

The Court: Yes.

Q. Mr. Kirkevold, in picture 9-A, which direction would that picture be taken, to shorten it up. I don't think there is any argument but that is a picture taken in what you call the store room?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. On that picture shows a table in the middle of that space? A. Yes.

Q. What is that,—is that the place where that table was normally?

A. No, it has been put up there to take things off the floor.

Q. You had no table arrangement in that place?

A. No.

Q. What would be in that space?

A. Racks.

Q. There were racks? [197]

A. We had those racks removed at the time the picture was taken.

Q. You don't know how long after the fire the picture was taken? A. No, not exactly.

Q. But some of the cleaning up had been done in that—— A. Yes.

Q. I hand you 9-B, showing some dummies in the middle of the picture. Were those dummies normally in that position? A. No.

Q. Where would they be?

A. They would be over in this portion of the work room.

Q. In your work room? A. Yes.

Q. And that shows the partition you built along the balcony in 1943? A. Yes.

Q. 9-C, is that a picture looking along the work room? A. Yes.

Q. And those were the coats that were being worked on that you referred to, a rack being worked on? A. Yes.

Q. These would be the sewing machines?

(Testimony of Meryl Kirkevold.)

A. Yes. [198]

Q. Handing you 9-D, where would that be taken from?

A. Oh, that is the picture that you just showed me, only it is from the other end. I mean, it is the other end of the room.

Q. You mean, this would be in your storage room? A. No.

Q. That is a picture of the work room?

A. Work room.

Mr. Velikanje: I offer those in evidence. You have no objection?

Mr. Hutcheson: No.

The Court: They will be admitted.

(Whereupon, pictures referred to were then received in evidence and marked Plaintiff's Exhibit No. 9.)

Q. Handing you identification 10, what is that?

A. These are coats that the firemen took out and threw on the stairs after the fire, or during the fire.

Q. Is that one reason why you are unable to determine what coats were where, and how many were in the work room, and how many were in the store room? A. Yes.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: Objected to as immaterial.

The Court: Objection will be overruled. [199]

(Whereupon, picture referred to was then received in evidence and marked Plaintiff's Exhibit No. 10.)

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: I believe that is all.

The Court: Let me ask you a question or two, Mr. Kirkevold. You say you were in the fur business prior to establishing yourself at this place.

The Witness: Yes.

The Court: And was your business somewhat similar to the business you conducted after you went into this Barnes-Woodin Store?

The Witness: You mean the size of the business, or——

The Court: No, not the size of the business. The type of business and character.

The Witness: Yes, the same type of business, yes.

The Court: And you received from the general public their furs?

The Witness: Yes.

The Court: To process them and then stored them and made a charge for the service?

The Witness: Yes.

The Court: And you carried insurance protection at that time, too? [200]

The Witness: As far as I knew, yes.

The Court: Well, did you have a policy?

The Witness: I had it with the same man.

The Court: And then, when you changed your location and went to the Barnes-Woodin Store, did the representative of the insurance company come up there and see the situation as you had it?

The Witness: I don't recall whether an agent

(Testimony of Meryl Kirkevold.)

from the—I mean a representative from the company came. Mr. Orkney——

The Court: Mr. Orkney?

The Witness: Oh yes, he was up there quite often.

The Court: Well, he was the agent of the company, so far as you knew?

The Witness: Oh yes.

The Court: And when you made the change from '42 to '43, was he up there at any time?

The Witness: He was in there quite often.

The Court: What would he come up there for?

The Witness: Just come up there and see us and look around, and go again.

The Court: Did he ever come up and collect any premiums from you? [201]

The Witness: No, as a rule we mailed those.

The Court: To him or to the company?

The Witness: To him.

The Court: Did he discuss with you this change that you were making?

The Witness: He saw the changes that we were making and had seen the coats and everything.

The Court: Did you have any discussion with him concerning that?

The Witness: No, just went on as if it were all right.

The Court: Before you found difficulties with the shortage of labor, and before you made these changes whereby you placed the customers' coats

(Testimony of Meryl Kirkevold.)

in this room, how long did it take you ordinarily to process a coat and put it in permanent storage?

The Witness: On the average, it would probably average a month. We were always about a month behind, something like that.

The Court: Well, after you had this room built and put the racks in these, were you able to expedite your processing steps, or——

The Witness: You mean, speed it up?

The Court: Yes.

The Witness: Not at that time. It was a [202] question of labor.

The Court: Well, how long was it taking you at that time?

The Witness: Oh——

The Court: From the time the customers' coat came to you and the time——

The Witness: Well, coats varied, depending on the amount of work to be done on the coat.

The Court: Well, how great a variation was that?

The Witness: Well, one coat could be from three days to a month and a half.

The Court: That is on the alterations?

The Witness: Yes, the coat could vary that much.

The Court: But, from the time the customer brought it until when you consider it went to the final storage?

The Witness: Well, I can't say definitely on any one coat, because maybe some coats were a little

(Testimony of Meryl Kirkevold.)

job, if that was all there was to do on it, and waiting for one processing of a coat ahead of it, that coat would probably get out of there sooner than a coat that came in just previous to that one.

The Court: I don't believe you understand. [203] I don't know whether you understand my question or not. Mrs. A. brought you a coat to have all the things done to it that needed to be done to a coat of that grade and standard, and then store it for the summer season. About how long on the average would those steps require?

The Witness: I don't know whether I still get you or not, but—because it just depends on what we had to do to the coat, for the length of time until it got into storage.

The Court: How long would it be in this temporary place, then?

The Witness: At least a month.

The Court: And how much more than a month—you say at least a month?

The Witness: Well, it might run a week over. It might run two days over. I just can't—

The Court: Before you built this place, where were those coats?

The Witness: Well, we didn't have the number, and they were hanging on little racks out here in this work room,—right in the work room.

The Court: Did you ever discuss with Mr. Orkney the changes that you were making there, and the reason for the change? [204]

(Testimony of Meryl Kirkevold.)

The Witness: Yes, he knew that we were building that place to hang the coats.

The Court: You say you discussed it with him?

The Witness: Yes.

The Court: And anything said about your policy covering or not covering such——

The Witness: No, I never discussed that with him.

The Court: Well, did he say anything to you?

The Witness: No.

The Court: When did you begin to pay premiums on these coats?

The Witness: Well, at the end of each—it is a reporting policy, and we followed the same procedure and sent our reports in.

The Court: As soon as they came in to you, did you list them subject to premium—fire insurance premium.

The Witness: At the end of the month.

The Court: At the end of the month?

The Witness: Yes, we go through and get our valuations and send them in.

The Court: You mean that you kept the coat there for a month before you paid any premium [205] on it at all?

The Witness: Well, I don't know how soon the premium was paid, but it was one of those monthly reporting policies where the——

The Court: Well, did it date back, that the coat came in?

The Witness: Well, it would.

(Testimony of Meryl Kirkevold.)

The Court: How?

The Witness: I don't know just how they figure that for insurance purposes, but a coat could be, before it was reported, could be in there—it could be in there a month or 30 days.

The Court: Well, but did your receipts that you gave the customers, a copy of which you kept, was that dated as the date when the coat came in?

The Witness: Oh yes.

The Court: Well, did that go to the company?

The Witness: Not the day it came in.

The Court: But it went with the date?

The Witness: No, there was no date under which we would make——

The Court: Then, you never paid any premium—insurance premium on this policy on the coats until the end of each month? [206]

The Witness: Yes.

The Court: You did not pay for anything that was in there, even though it came in a month before?

The Witness: Oh yes, you just take the total each month.

The Court: That is what I am trying to get clear, you take it from the day it came in—you made a monthly report?

The Witness: Yes.

The Court: And some items on that were 30 days old, some were 10 days?

The Witness: Yes.

The Court: Some were 5 days?

The Witness: Yes.

(Testimony of Meryl Kirkevold.)

The Court: Now, did you pay a premium on it based upon the age of the item itself, for the time it was with you, or who calculated that premium?

The Witness: Well, I don't know. I don't know just how they work it. But I just take the total valuation that was in the store, and that would be sent in each month, and the next month you would take the total and send it in, and if it was increased any—if it decreased, you [207] wouldn't pay as much.

The Court: I think that is all I wanted to ask along that line.

Mr. Velikanje: Mr. Kirkevold, along that line, if you had a coat come in on the 25th of the month.

The Witness: Yes.

Mr. Velikanje: That would be included in your monthly report at the end?

The Witness: At the end of the month.

Mr. Velikanje: Given on the basis of the whole month?

The Witness: Yes, sir.

Mr. Velikanje: In other words, for your whole month's amount you took what you had on hand at the end of that month?

The Witness: Yes, sir.

Mr. Velikanje: Irrespective of whether you had a little in the beginning and a lot in the end, or a lot in the beginning and a little in the end.

The Witness: Yes.

Mr. Velikanje: Once a month you made a report

(Testimony of Meryl Kirkevold.)

of everything you had on hand at that date, is that correct? [208]

The Witness: Yes.

Mr. Velikanje: Does that answer Your Honor?

The Court: Yes.

Recross Examination

By Mr. Hutcheson:

Q. This was the first policy that you had with the Home Insurance Company, wasn't it, issued in August, 1942? A. As far as I know.

Q. In other words, if Mr. Orkney has issued a former policy, it was in some other company wasn't it, before that? A. Well, yes, I imagine.

Q. Now, do I understand you to say that the Barnes-Woodin Store as distinguished from your fur department had things on the mezzanine floor in 1942? A. Yes.

Q. Was that at the catwalk there or whereabouts was that?

A. Along the catwalk and along in the back.

Q. What kind of things did they have there?

A. Well, display fixtures and glass, and——

Q. They didn't take up very much room, did they?

A. I don't know how much they took up, but it was all [209] kind of piled in there, probably a lot of old stuff that they had.

Q. It was fixtures, rather than merchandise?

A. Oh yes.

Q. Now, as I understand, right from March,

(Testimony of Meryl Kirkevold.)

1942 when you first went in there, you always had the problem of what to do with the fur coats that were waiting to be repaired and worked on, didn't you? You had to keep them somewhere, didn't you?

A. We always had to hang them someplace.

Q. In other words, in 1942 you could not go to work and repair a coat as soon as it was brought in, could you?

A. We had lots of—we had lots of help at that time, and our business was very small.

Q. Well, just answer the question. At that time you did not prepare a coat as soon as it came in, did you,—repair a coat as soon as it came in?

A. No.

Q. And at that time you used the same method, didn't you, of hanging it out in this room here on the mezzanine floor until you got around to working on that coat in its regular order, that is right, isn't it?

A. Yes.

Mr. Hutcheson: That is all [210]

Redirect Examination

By Mr. Velikanje:

Q. Mr. Kirkevold, however, you stated in 1942, you stated you did not have business——

Mr. Hutcheson: I object to that as leading and suggestive. Counsel is testifying.

Mr. Velikanje: The counsel had his answer the question "yes" or "no," and I think he has a right to qualify——

(Testimony of Meryl Kirkevold.)

The Court: I think he answered and qualified his answer. He said he had plenty of help and had a small business.

Mr. Velikanje: That is all.

(Witness Excused.)

EARL KIRKEVOLD,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is Earl Kirkevold?

A. Yes, it is.

Q. You are a brother of Meryl? A. Yes.

Q. Earl, were you in business with your brother in 1943? A. Yes, I was.

Q. For what period of time?

A. I believe it was approximately May to December 1st.

Q. Then, where did you go?

A. I went in the army.

Q. And when did you get out of the army?

A. December 1st, of 1945.

Q. And are you back in the business with your brother again, now? A. Yes, I am.

Q. What experience have you had in furs?

A. I apprenticed in the fur business in 1926.

Q. In other words, you have been in the business for 20 years? [212] A. Yes.

(Testimony of Earl Kirkevold.)

Q. Have you been doing that solely and exclusively? A. Solely.

Q. Where has your business experience been?

A. With leading furriers in Seattle, with the William T. Nott Company, in their stores.

Q. During this whole period of time, except for your period in the army? A. That is right.

Q. Are you familiar with fur prices?

A. Yes, sir.

Q. Did you hear the testimony yesterday of your brother as to the values of those coats?

A. Yes, I did.

Q. Have you gone over the proof of loss and are you acquainted with those coats?

A. Yes, sir.

Q. Do you feel that the value he placed on those coats is a fair and reasonable value?

A. I do. I believe that in most cases, or in lots of cases, I should say, they were undervalued.

Q. That the value he placed on them is undervalued? A. Yes.

Q. Were you there in the Barnes-Woodin and Company when these changes were made in the mezzanine floor? [213] A. In '43, Yes.

Q. About when in '43 were they made?

A. It was during the course of our storage season in the summer.

Q. What changes were made?

A. The change was made in the remodeling the back end of the space in question, into a storage room.

(Testimony of Earl Kirkevold.)

Q. Had it been used as a storage room prior to that time? A. Not to my knowledge.

Q. Well, was it used as a store room when you came into the business? A. No.

Mr. Hutcheson: That is objected to as leading and suggestive.

Mr. Velikanje: Oh, I don't think so.

Q. What was the use of it when you came to the store?

A. As I recall it, there was window display fixtures—oh, display merchandise, I should say, stored there—fixtures to display merchandise for window and——

Q. Did they belong to Kirkevold?

A. No, that was Barnes-Woodin.

Q. Do you know Mr. Jim Orkney?

A. Yes, I do.

Q. Did you ever see him around the business?

A. Well, when I was there he used to come in about once a [214] month.

Q. About once a month?

A. Approximately.

Q. Would he look over the set up?

A. Yes.

Q. Did he ever discuss with you, or to your knowledge with Meryl, as to this insurance policy?

A. No, he never discussed it with me, or to my knowledge with Meryl.

Q. Did he ever see you while you were constructing this back fur storage space?

A. I believe he did.

(Testimony of Earl Kirkevold.)

The Court: You are speaking now of Mr. Orkney?

Mr. Velikanje: Mr. Orkney, yes.

Q. Since 1943, what has been the use and purpose of this space, marked here as "store room?"

A. Since 1943?

Q. Yes. A. Storage.

Q. Has——

Mr. Hutcheson: Well, if the Court please, that is objected to. This man was in the army the entire period, and during a long time——

Mr. Velikanje: We will say during the [215] period you were there. A. Storage.

Q. Did you ever see it used for anything else?

A. No, it didn't have room for anything else except for storage—we needed the space for storage.

Q. Was anybody walking through there to any other place? A. No.

Q. You were not there at the time of the fire?

A. No, I was not.

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. As your brother testified, the only change made there was putting in a partition on the mezzanine, and putting in some additional racks, that is correct, isn't it? A. Yes.

Q. By the way, these racks were moveable,

(Testimony of Earl Kirkevold.)

weren't they—that is, they were on wheels or casters?

A. I believe that two of them were moveable, and two of them were permanent fixtures.

Q. Just when were those things done?

A. Well, I can't give you the exact date. It was during the summer—the early part of the storage season when I first came. [216]

Q. Of what year? A. '43.

Q. Did you see yourself, any of these coats that were destroyed or damaged in the fire? You did not, did you?

A. Yes, I did. I got an emergency furlough after the fire.

Q. After the fire?

A. I was home one day.

Q. How long after the fire were you here?

A. It was about—I can't give you the exact date, but I imagine it was within 10 days or a week.

Q. You were not here before the fire?

A. Oh, no.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. You state there was only the building of the racks and the building of the partition. Was the Barnes-Woodin display equipment moved out at that time, too? A. Yes,

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all.

(Witness excused.) [217]

E. C. FLEMMING,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

Q. What is your name?

A. Flemming—E. C. Flemming.

Q. Where are you employed?

A. Barnes-Woodin Company.

Q. How long have you been with Barnes-Woodin Company? A. A little over 31 years.

Q. In what capacity?

A. Well, I was Vice-President and Manager under the old regime, and operating manager of it under C. C. Anderson and Company.

Q. Are you familiar with the Kirkevold Fur set up at the time of the fire in May, '44?

A. Yes, sir.

Q. And previous to that time? A. Yes.

Q. At the time of the fire, referring to Exhibit 5, what purpose was this space marked "store room" used for?

A. That is the space back of the show room?

Q. Yes. [218]

A. That was used for storage, for storing fur coats that came in, and as I understand it these coats were put there waiting to be processed and taken up in their second floor, into the storage room.

(Testimony of E. C. Flemming.)

Q. Do you know how long those coats would be stored there? A. No, I haven't any idea.

Q. Were you into that space, or looked into that space, once-in-awhile? A. Oh, yes.

Q. In your operations, how long had that been used for that purpose?

A. Do you mean this—back storage room?

Q. Yes.

A. Of course, I can't remember the date, but I would judge at least a couple of years.

Q. Was it used that way all the time that Kirkevolds were there?

A. Well, I don't remember that exactly. Of course, there were several changes, but I don't remember whether it was used for storage all the time or not. I think it was.

Q. Did the Barnes-Woodin Company store some of their things there awhile?

A. Going along the windows—going along the west side of the store was—about 6 feet up there was what we call the catwalk that was used for storing displays and [219] manikins. To go into that, you have to go along the Fur Department, alongside of the front edge of the balcony, and we kept in that catwalk all our fixtures, and of course there had to be access through the Fur Department at that time to get in, and along the wall there was—we used to store garments that were going into the windows that were put up on a rack, and finally we put just—well, it was just fixtures like tea stands and some manikins, and so forth. That was used for storage

(Testimony of E. C. Flemming.)

along that rack. They did not use it when Kirkevold was first there.

Q. After they had been there awhile, was a change made?

A. Yes, there was. There was a dispute arose, and they built racks and I think they were substantial racks, as I remember it, along that whole place, from the edge of the stairway wall clear back.

Q. Then, that space, that was partitioned back, was no longer used by the Barnes-Woodin Company for the——

A. No, our equipment then was all moved upstairs.

Q. That was the change made at that time?

A. We couldn't use that because to do that we had to go right through the main Fur Department, so we took it all upstairs.

Q. So anyone desiring to get across this catwalk would use [220] this runway along the balcony which was partitioned, and separate from the Fur Department?

A. It was separate, because the wall of the stairway came out quite aways, and to go through, you had to go along—then, he put the partition in and that blocked that all off and we put everything off and put them up on the second floor, all the fixtures.

The Court: Did you have anything to do with leasing this space to Mr. Kirkevold?

A. No, Mr. Woodin handled that, entirely.

(Testimony of E. C. Flemming.)

Q. Were you familiar with it at all, as to what he paid as a rental?

A. Well, no I don't remember.

The Court: I probably should have asked that question from the Plaintiff himself as to whether there was a change made in the expansion of quarters, and increase of rental in '43, or '42, when he had more space.

The Witness: No, there was no increase. We did not make any increase, I know that.

Q. Mr. Kirkevold operated with Barnes-Woodin and Company on a percentage basis?

A. Yes. [221]

Q. So, it is not a rental basis?

Mr. Flemming, has the cause of the fire ever been determined? A. No.

Q. There is no known cause of the fire?

A. No known cause. I don't think the firemen ever rendered a verdict either, on that.

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. There was no change made in the percentage basis—that part Mr. Kirkevold operated, by reason of these changes in 1943?

A. No, only a percentage basis.

Q. When you say on a percentage basis, do the receipts of the business go to your company and then a percentage of those to Mr. Kirkevold or is it the other way around?

(Testimony of E. C. Flemming.)

A. In other words, if he sells ten dollars' worth, we get say fifteen per cent—we get a dollar and a half.

Q. He pays you a certain percentage?

A. Yes.

Q. You say there was no change made?

A. No, the percentage remains the same. The more business he did, the better off we were. [222]

Q. When did your company, the Barnes-Woodin Company, sell out to C. C. Anderson, of Boise, and the new company took possession—when was it, May 1st?

A. May 1st, 1944.

Q. About 9 days before the fire?

A. That is correct.

Q. Mr. Flemming, your company gave financial assistance in some manner, did you not, in connection with the settlement of the fur owners?

A. Are you speaking about the new company, or the old company?

Q. Either one, but I assume it would be the new company.

A. I don't know about the new company, but I know any time they needed any assistance, I know the old Barnes-Woodin Company did. I don't recall that they needed it.

Q. Do you know yourself whether either company gave financial assistance in connection with the settlement of the fur coat customers after the fire?

A. I don't know anything about that.

Q. In other words, your position is operations manager of the store?

A. That is right.

(Testimony of E. C. Flemming.)

Q. Do you remember approximately when this partition was put in and the changes made?

A. No, I haven't any idea. I know it was sometime after Kirkevolds took over. Previously, we always used that [223] catwalk and that corridor. We used that as a storage room—that is, for fixtures.

Q. As a matter of fact, so far as the use of the space on the mezzanine was concerned, Mr. Kirkevold proceeded just about the same after the partition was put in as before?

A. He had more space and he had more storage room.

Q. He had more space? A. Well, sure.

Q. Well, did you—your company use as much of the space before the partition was put in, the space in here which is called “store room” on this map (indicating)?

A. Well, let me get the idea. I have not seen this map before.

Q. In other words, the back stairs are here (indicating).

A. Here is the runway here, is that right?

Q. Yes, this is the front of the mezzanine.

The Court: You have to speak a little louder.

Q. And you notice where it is written here “store room,” before the partition was put in in 1943 or whenever it was, Mr. Kirkevold used that space, most of it, at that time?

A. No, you are mistaken.

Q. Didn't he?

A. No, he did not. He did not use from this part

(Testimony of E. C. Flemming.)

over here [224] at all (indicating), because it was used as a runway, and as a storage for fixtures, and there would have been no place to put racks. He could have walked up and down there on the floor, but he could not use it as a business part.

Q. How wide a space did the Barnes-Woodin Company in the Fur Department use on the mezzanine, before the partition?

A. I would say that runway is about—probably 5 or 6 feet wide,—the full length from here (indicating) back.

Q. And before the partition was put in, the Barnes-Woodin Company used the space, about 5 or 6 feet wide?

A. They used the entire space here, and they had to use the runway across over into here, and naturally this was open. They had to use the runway. They had to have an access to this place over here. This Fur Department by Holmes & Benioff was originally over here, and they had loose racks here, and we had to keep a runway all the time, because these window men were using fixtures all the way through there.

Q. No use going back that far, but how wide a space was used by Barnes-Woodin Company in 1943?

A. I would say 5 or 6 feet wide and whatever length this is, and then the runway along here, that could be used. It had top racks. This was definitely used by the Barnes- [225] Woodin Company.

Q. And any fur coats in 1942, and up to the time

(Testimony of E. C. Flemming.)

the partition was put in that was waiting to be repaired or worked on there, were kept in that room on the mezzanine floor?

A. They were kept in part of the room on the mezzanine floor. They were kept in this section here (indicating).

Mr. Velikanje: You refer to the space here. Is that the space marked "work room?"

A. Yes, that is the work room right here. Here is the entrance. You see the racks, and here is racks.

Q. There never was at any time any partition, was there, or any physical objects separating what is referred to as the work room and what is referred to as the store room?

A. There wasn't here, but there was here (indicating). Of course, from the store room, this separated them.

Q. But other than what separated the show room or sales room and the work room, there was no partitions or separations of any kind, physically, between what is referred to here as a work room and a store room?

A. No, no, this store room actually stopped right here (indicating), when he first took it over. Later, of course, he took this over and partitioned it, and I am sure there was stationary racks in there.

Q. You say it actually stopped there. You don't mean there [226] was any wall or partition there?

A. Oh, no, there was no partition here, but this space was used by the Barnes-Woodin Company.

(Testimony of E. C. Flemming.)

Q. About 5 or 6 feet wide?

A. By about 12 or 14 feet, something like that. I don't know what the length of it is.

Q. And then, before the partition was put in, the same method was used, but after the work had been done on the fur coats, they were taken to the storage room up on the second floor?

A. As I understood it, yes.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. Mr. Flemming, Mr. Hutcheson said the Barnes-Woodin Company used only a space 5 or 6 feet wide. Was the rest used by Kirkevold?

A. None of that space was used by Kirkevold. This, I understand, is the wall going to the stairway between this, and this is the balcony front, is it?

Q. Yes.

A. There was none of that used from there, clear back to the windows here.

Q. Prior to the time they partitioned this off?

A. Yes.

Mr. Velikanje: That is all.

(Testimony of E. C. Flemming.)

Recross Examination

By Mr. Hutcheson:

Q. You say the space that was used by Barnes-Woodin Company was about 5 or 6 feet wide?

A. Whatever the length of this is. I would say 10 or 12.

The Court: About 5 or 6 feet wide, and 10 or 12 feet long?

A. Whatever the length of that partition is.

Mr. Hutcheson: That is all.

(Witness excused.) [228]

HAZEL FIEBELKORN,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is Hazel Fiebelkorn?

A. Yes, sir.

Q. Mrs.? A. Yes.

Q. Mrs. Fiebelkorn, where are you employed?

A. Barnes—well, with the Kirkevold Fur—Barnes-Woodin Company.

Q. In what capacity?

A. I work in the work room.

(Testimony of Hazel Fiebelkorn.)

Q. In the work room. How long have you been employed by them? A. About 3 years.

Q. Were you employed by Meryl Kirkevold in May of 1944? A. Yes.

Q. At the time of the fire? A. Yes.

Q. Were you working the day of the fire?

A. Yes.

Q. Mrs. Fiebelkorn, referring here to Exhibit 5—you might step down and look at this. That has been [229] identified as a drawing of the Kirkevold Fur Department in the Barnes-Woodin Company at the time of the fire. The part marked here “sales room,” and this is “work room,” and this marked a “store room,” now where did you work?

A. I would work right up in here most of the time. The machine was setting—was moved here more—back and forth, but it was more sitting right in here somewheres (indicating), and I worked from there, right around in here (indicating).

Q. You worked in the part marked as a “work room?” A. Yes.

Q. Were you in charge of the “work room?”

A. Yes.

Q. Who was in charge of the “work room?”

A. Mrs. Hawk.

Q. She is no longer around, is she?

A. No.

Q. Did you say you had worked for them 3 years? A. Yes.

Q. When did you come to work for them, do you remember?

(Testimony of Hazel Fiebelkorn.)

A. Well, it was about the last of November, I believe—the last of November.

Q. In '42 or '43? A. '42. [230]

Q. Were you there when they made these changes in the construction?

A. Some of them were made, but they made a few more after I was there.

Q. You don't remember just what was made there?

A. No, because I had not worked long enough, and I did not take much interest in it, you know. They were building.

Q. They were building at the time you came?

A. Well, in November when I came, they were pretty busy, but they fixed it when they were not quite so busy.

Q. Referring to the period after let's say November of 1943, what was this space marked "store room" used as?

A. Well, that was all store room. They just stored coats.

Q. Was it used for any other purpose?

A. No, just storage for coats, and the shelves in the back for our fur pieces that we used for repairs.

Q. That was small pieces? A. In boxes.

Q. Was there any work tables back there?

A. No.

Q. Was anybody walking through to get in any place else? A. No.

Q. Mrs. Fiebelkorn, at the time of the fire what

(Testimony of Hazel Fiebelkorn.)

percentage of the coats destroyed were in the work room, and what percentage were in the—what has been termed [231] store room? Approximately what per cent were in the work room?

A. Well, that would be hard to say, but it would be comparatively a small per cent.

Q. What, 5, 10, 15, 20, 25—what per cent?

A. I would say 20 or 25.

Q. Twenty or twenty-five per cent of the coats destroyed? A. Yes, sir.

Q. Were in this portion marked work room?

A. Yes, I imagine.

Q. After a coat was brought in—let's say for repairs or for storage, where was it placed when it originally came into the shop?

A. When it first came in?

Q. Yes.

A. It was put back where it is marked "storage room."

Q. How long would it remain there?

A. Well—I am figuring as of the time—about the time of the fire. Well, it would be about a month.

Q. About a month? A. More or less.

Q. And then what would be done with it?

A. Well, it would probably be worked on, or whatever had to be done to it, and finished up, and put in storage.

Q. And put in storage where? [232]

A. On the second floor.

Q. Let us say that a coat was brought in, not

(Testimony of Hazel Fiebelkorn.)

for permanent—not summer storage, but for repair, state what would be done with that coat?

A. It would probably be hung back there in the work room until we were notified as to what she wanted to do, come in and get it or for storage. It would probably hang there until they showed us about it.

Q. Hang where?

A. Back in the storage room.

Q. Back in the storage room here (indicating)?

A. Yes.

Q. Were coats ever taken directly up to the upstairs storage, pending the time of repairs and cleaning?

A. You mean, when they were brought in, taken right up to storage?

Q. Yes. A. No.

Q. Was that back space, or that back storage space full most of the time? A. Yes.

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson: [233]

Q. When did you say that you first went to work there, Mrs. Fiebelkorn?

A. I don't remember the exact date, but it was in the last part of November '42.

Q. And you have worked there continuously since that time? A. Yes.

Q. And you are employed there at the present time? A. Yes.

(Testimony of Hazel Fiebelkorn.)

Q. You have worked in the work room during all that period? A. Yes.

Q. Well, where is Mrs. Hawk, now, do you know? A. I don't know.

Q. When you first went to work there, in November of 1942, had the partition that has been referred to here this morning been put in yet?

A. Well, I can't remember that for sure, because I was new and I was given a table to work at, you know, and I did not move around much, but I know that the next spring they did do a lot of work there, changing things around and put in racks.

Q. What changes if any were made there after November, 1942, and during 1943?

A. Well, they did work on that wall. Now, just for sure, you know, to say right off, I wouldn't know because I don't know for sure what was there before, and they put in [234] new racks and got it for storage. They were using it all for storage.

Q. They put in additional racks there?

A. Yes.

Q. When you first went there, coats were being stored, weren't they—or I won't use the word "stored"—they were being kept for the time being, weren't they, in this part here where it says "store room"?

A. I don't know for sure about that. I don't know where they got the coats, because I sat over in the other corner, and I was given something to do, and I did that, and I didn't do much—

(Testimony of Hazel Fiebelkorn.)

Q. Well, you worked there every day, didn't you, all of that time?

A. Yes, but what I mean, I am not sure how they had that fixed back there—how that was.

Q. How many hours a day did you work in that room? A. That would be about 7 hours.

Q. And you worked right along continuously every working day, practically from November, 1942, to the present time, except vacations?

A. Yes, sir.

Q. Well, where would you go to get a coat to do repair work on it when you first went there?

A. Well, I didn't—I didn't go and get it. That is what [235] I was saying, I would ask somebody what I was supposed to do next, and they generally give me a coat to do. When I first went there I knew nothing of the business, and they would give me and tell me what to do, and I hardly ever moved away from my table, excepting to go out and in.

Q. After a day or two, you became quite familiar with the surroundings, didn't you?

A. Yes, the part I was working in.

Q. About how long was that room you were working in, would you estimate it?

A. I am not very good about estimating. I couldn't say how wide that is.

Q. Was it a large room, or small room, would you say?

A. Well, it seems quite small with everything in there, and everything, but as to actual feet, I wouldn't say.

(Testimony of Hazel Fiebelkorn.)

Q. When you first went to work in what seemed to you as a small room, was there any small partition here, near the—you understand this is the front of the mezzanine balcony here, at the lower side of this diagram—was there any partition there when you first went to work?

A. I wouldn't remember for sure.

Q. You don't remember?

A. No, I wouldn't say.

Q. Whether there was any partition built there after [236] November, 1942, you don't remember?

A. I think it was the next spring they were working on it, but I couldn't say for sure whether that was all wall, whether they fixed that in, because I didn't do much around there until the next spring, and then I helped with the storage and things, and then I do know that was all partitioned up then. Before that I didn't have much business back in there and I couldn't say for sure.

Q. The general method of conducting the business remained the same, didn't it, when you first went there before the partition was put in, as well as up until the time of the fire; namely, that fur coats of customers that were brought in there, were hung in racks somewhere in that room and were ready to work on them and then you worked on them, is that right?

A. They were, yes, they were always hung up.

Q. And hung up in that room on the mezzanine floor?

A. Yes, somewhere in there.

Q. And then after you finished, the method re-

(Testimony of Hazel Fiebelkorn.)

remained the same when you first went there, and right up until the time of the fire, when the work was finished they were taken into the storage room upstairs on the second floor? A. I imagine.

Q. Well, you know, don't you?

A. Well, there is a lot to do but I did ripping and things [237] like that at first; and I didn't have anything to do with the storage. Someone else took care of all that, but I imagine it was the same.

Q. To the best of your knowledge, it remained the same? A. Yes.

Q. After you finished working on a coat, it was taken in storage upstairs, wasn't it?

A. I imagine, because that is the way we have still been doing it.

Q. And in your work there, you used that expression, didn't you, when it was taken upstairs you called it "put into storage"?

A. We have what we call a finishing rack, and when we were through with it, we hung it up there, and someone else took it from there and took it to storage, I imagine.

Q. Took it to storage, and then it was taken to the second floor upstairs, is that right?

A. I imagine.

Q. Well, to the best of your knowledge.

A. Yes.

Mr. Hutcheson: That is all—pardon, one question.

Q. Would you step down to look at the diagram

(Testimony of Hazel Fiebelkorn.)

a moment? I believe I forgot to ask Mr. Kirkevold this, but at all times there was a door to the stairs in the upper left [238] hand corner of this diagram, wasn't there? A. Yes.

Q. There was a stairway there that went down to the west side of the building on North Third Street, and also the way upstairs?

A. Yes, sir.

Q. And just where was that door there? Was it at the point that is marked there—is that where the door was? A. Well, yes.

Q. Of course, according to that, it is marked right square in the corner.

A. I couldn't remember for sure—I remember opening that door. It went back against the wall.

Q. So, you would——

A. I would say that is about right.

Q. That is located correctly there, and that door was there when you first went there, wasn't it?

A. Yes.

Q. And remained there until the fire?

A. Yes, I am sure it was.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. Mrs. Fiebelkorn, to refresh your recollection, at the time you came to work for Kirkevold, didn't they have a [239] high rack in the work room where you had to walk under the coats when the coats were waiting to be repaired, do you remember? A. You mean——

(Testimony of Hazel Fiebelkorn.)

Q. Along the—in the work room, along this inner wall? A. Oh, yes.

Q. Is that where they were kept when you first came, do you remember?

A. Well, I don't remember for sure. Like I said, I would ask somebody and they would get me something to work on, but there was a rack there.

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all.

(Witness excused.)

The Court: I think we will take a morning intermission, now. We will recess for 15 minutes.

(Recess.) [240]

BERNICE STEVENS,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

The Clerk: Your name, please.

The Witness: Bernice Stevens.

Q. Your name is Bernice Stevens?

A. Yes, sir.

Q. Mrs. Stevens, where are you employed?

A. I am employed at the Kirkevold Fur Department.

(Testimony of Bernice Stevens.)

Q. In the Barnes-Woodin Fur Department?

A. Yes.

Q. How long have you been with them?

A. Since the first part of April, '43.

Q. April, 1943? A. Yes, sir.

Q. In what capacity are you employed by them?

A. Saleslady in the sales room.

Q. You are in charge of the sales room?

A. Yes.

Q. Did you have such position in May, 1944?

A. Yes, sir.

Q. Mrs. Stevens, referring to Exhibit 5, which is a [208] drawing of the location of the Kirkevoold Furs at the time of the fire, where was your place in that organization—where was your location?

A. On the mezzanine floor, at the top of the front stairs.

Q. Would that be in this space marked "sales room"? A. Yes.

Q. What duties did you have relative to coats that came in for repair or for storage?

A. I received the coats and gave them their necessary receipts.

Q. And then what did you do with the coat?

A. I hung it on the work rack, just through the curtains.

Q. It was back in this——

A. I would hang it through the curtains on the racks.

Q. Then, would your interest in that coat cease?

A. Yes, I had nothing else to do with it.

(Testimony of Bernice Stevens.)

Q. You had nothing else to do with it?

A. -No.

Q. You were familiar with the shop, however?

A. Yes, sir.

Q. What purpose was the space marked "store room" on this map used for, during all the period you were there? A. For storing coats.

Q. Was it used for any other purpose?

A. Sometimes we would have new coats hanging on there. [242] I would frequently hang new pieces on there when I had surpluses.

Q. You mean those would be coats that were owned by the store?

A. Yes, if I had too many in my sales room.

Q. Used them as—just for storage, for that purpose? A. Yes.

Q. Do you know what percentage of coats and furs were in the work room, and what per cent in the spare room in back? A. I wouldn't know.

Q. You have no information?

A. I have no information as to that.

Q. I show you an Exhibit 9-C is that a picture that was taken in the work room?

A. Yes, this is the work room. This is the partition.

Q. Are all of those coats that are evidenced in this picture, customers' coats?

A. I couldn't be sure.

Q. Or customers' pieces?

A. I couldn't be sure.

(Testimony of Bernice Stevens.)

Q. Well, did you have any of the store's coats and pieces hanging there at that time?

A. There would be, yes, very few, I think.

Q. There would be very few? A. Yes.

Q. But, you would have some in that space?

A. Yes.

Q. At the time you came to work for Kirkevolds, was the partition between the balcony and the catwalk or between the store space and the catwalk across the balcony? A. I think it was.

Q. You think it was? A. Uh-huh.

Q. And has this space been used for any other purpose since you have been in their organization, than for storage of furs? A. Just those.

Q. Just for storage of furs—

Mr. Velikanje: You may inquire—pardon me, just a moment.

Q. Are you familiar with coats—with fur coats?

A. Yes.

Q. Are you familiar with the processing of them before they are put into storage?

A. Yes.

Q. Are coats put directly into storage?

A. No.

Q. What is done to them?

A. They are inspected for various things, for loose buttons, loose linings, they would be re-tanned.

Q. Are those all things necessary, that are necessary before they are placed in storage upstairs? A. Yes.

Q. Do you know how long a coat would stay in

(Testimony of Bernice Stevens.)

the downstairs storage before it would be worked on? A. I don't know really.

Mr. Velikanje: That is all. You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. Referring to that as downstairs storage, as counsel has, by "downstairs", of course we mean the mezzanine. The coats were just kept there, weren't they, temporarily, until they could be worked on?

A. No, they were—I don't know how long they would be there after I put them through into the work room. I wouldn't know how long they would be there.

Q. Well, were they permanently stored there on the mezzanine floor?

A. They would be sometimes there a month or two.

Q. A month or two. Well, that would be just until they could be reached in their turn to have the repair work or whatever it was done on them, isn't that right?

A. I couldn't say for sure.

Q. You don't know as to that? [245]

A. No, I don't know.

Q. Your work primarily was in the selling of new coats?

A. Just in the selling of furs. I wasn't, in fact, in there much.

Q. The general practice was that after the work had been done on a coat in the work room, it was

(Testimony of Bernice Stevens.)

then taken and put in storage upstairs on the second floor, wasn't it?

A. That would be put in the vault upstairs.

Q. And that practice remained uniformly all of the time that you have worked there, hasn't it?

A. I suppose.

Q. To the best of your knowledge?

A. To the best of my knowledge.

Q. Do you know how it happened, Mrs. Stevens, that in some instances, the value was not put on the receipt that was issued there. Was that just a mistake that was sometimes made?

A. It was just an oversight, I imagine.

Q. An oversight? A. Uh-huh.

Q. Did you have anything to do yourself with issuing certificates where the customer wanted an insurance certificate?

A. Yes, I wrote the policy.

Q. And in some instances, I notice, the certificates and the [246] valuation on the receipts for the same coats were different amounts. How did that happen? Was that just an oversight also, or——

A. I don't understand.

Q. Well, in some instances where certificates were issued, the amount stated on the certificate differed from the value of the same coat stated on the receipt. Do you follow me? A. Yes.

Q. And I just—my question was just how did that happen? Was that——

A. I don't know how that happened.

(Testimony of Bernice Stevens.)

Q. Did you keep a record there of certificates that you issued?

A. Yes, there was a record. We had a copy and the company had a copy.

Q. If the certificate was issued before the coat was brought in, then did you make a practice of referring to the amount on the certificate when you came to fill in the receipt?

A. I don't remember whether I would refer to it or not. I would take their word for it, I think, what their valuation was.

Q. You would take the customer's word for it in issuing the receipt, what value they wanted to place on it? A. Yes. [247]

Q. Do you have any other explanation how that happened, different amounts were stated on the certificates and the receipt? A. No.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. Mrs. Stevens, wasn't it a practice to limit the amount on the receipts—

Mr. Hutcheson: I object to that as being leading and suggestive.

The Court: Let him finish his question.

Q. Wasn't it a practice to limit the amount on the receipt to two hundred dollars if the parties had a certificate? A. Yes.

Q. If you went to get a coat for a customer that had been brought in only for repair, not for permanent summer storage, where would that coat be?

(Testimony of Bernice Stevens.)

A. Well, it could be either on the repair rack or in the downstairs storage.

Q. Let's say the coat had been ready for a month.

A. It was in the downstairs storage.

Q. They were never taken to the upstairs storage? A. No. [248]

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all.

(Witness excused.)

JAMES MILNE

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is James Milne?

A. That is right.

Q. Where are you employed?

A. I am managing director of Barnes-Woodin Company.

Q. How long have you been such?

A. Since we took the store over.

Q. On what date was that?

A. That was May 1st, '44.

Q. Were you in charge of the store at the time of the fire? A. Yes, I was.

(Testimony of James Milne.)

Q. Had you previous to the fire gone completely over this store? A. That is right. [249]

Q. Were you familiar with its operation?

A. I was familiar as I could be in the period of a week.

Q. Were you familiar with the Fur Department?

A. I had made an inspection of all the premises.

Q. During the period that you were there, it would be only a few days, would it not?

A. That is right. I left on Saturday of that week. I came over on Sunday, and was there a week and left on Saturday. I was in Lewiston, Idaho, at the time of the fire. I came back the next morning.

Q. Mr. Milne, in the short time that you were there, did you ever see this part marked "store room" used for any other purpose than the storing of furs?

A. No.

Q. Mr. Milne, did you assist Mr. Kirkevold in attempting to make adjustments of his insurance?

A. Well, Mr. Kirkevold came to me some time after—I would say it was probably 3 weeks to a month after the fire, and told me that there was apparently some trouble with his insurance, and asked me what I thought he should do. Prior to that time, I had talked to Mr. Sinclair, who was the adjuster on several occasions.

Q. Who did Mr. Sinclair represent himself to be?

A. He was the adjuster for the Home Insurance Company, as I understood. [250]

(Testimony of James Milne.)

Q. Did you have some other adjustments in your own losses in the store made with him?

A. Yes, he handled part of our loss, too.

Q. Did you ever discuss with Mr. Sinclair the loss on the Kirkevold furs?

A. I talked to Mr. Sinclair on several occasions.

Q. What were those conversations?

A. I don't remember that we ever—that I asked him definitely what the coverage was, because I had never had any intimation that the coverage was not full, and I recall talking to Mr. Sinclair regarding the card system that they had, and they brought these coats up off the mezzanine onto what was left of the beauty shop on the second floor, and they stored them up there—all of these damaged coats, and I recall very definitely one day I was back there and asked Mr. Sinclair how they were coming along in the adjustment, and he said they were trying to find which coat went with which certificate, and he also said at the time there were several certificates that they believed was destroyed in the fire. However, the main part of them seemed to be there.

Q. Did Mr. Sinclair advise you that they were not to pay this? A. No.

Q. Did you ever talk to Mr. McKinley?

A. Yes, I did. [251]

Q. Who is Mr. McKinley?

A. Mr. McKinley was another adjuster for the Home Insurance Company who took over when Mr. Sinclair left.

Q. What was your conversation with him?

(Testimony of James Milne.)

A. I called Mr. McKinley, due to the fact that Mr. Kirkevold had come to me and told me that he was having trouble with his adjustment, and I asked Mr. McKinley what the trouble was. Mr. McKinley stated that the company did not feel that the storage room on the mezzanine was a storage room—and do you want me to go into details?

Q. Yes, go ahead with your conversation.

A. I asked Mr. McKinley at the time,—I had gone over Mr. Kirkevold's policy with him, and as far as I could see, why, what little knowledge I had of it, it looked all right, and I asked Mr. McKinley what the difficulty was, and he said that this room on the second floor—or rather on the mezzanine, did not constitute a store room, and I recall the time I asked him what we were sitting in at that time, which was my office, and he said it was an office. I asked him what it would be if I took the desk and chairs and everything out and filled it with dresses, and he maintained it would still be an office, and that was about the gist of the conversation because I did not agree with him. [252]

Q. As a result of this adjustment or lack of adjustment, did you have considerable customers' complaints with the Barnes-Woodin Company?

A. We did have quite a few complaints.

Q. Over what period of time were they working on this adjustment?

Mr. Hutcheson: If the Court please, this is objected on as immaterial.

(Testimony of James Milne.)

The Court: I doubt whether it is. They did not make the——

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. Mr. Milne, your company did furnish financial assistance to Mr. Kirkevold in making a settlement with the fur customers?

A. We carried Mr. Kirkevold. Mr. Kirkevold's arrangement with us is that we pay all of Mr. Kirkevold's running bills—pay his invoices on coats. At the end of each month there is a settlement made at which time the deductions are made from the total sales figure, the percentage that we get is deducted, plus all of Mr. Kirkevold's expenses that we have paid for him. [253] Then, whatever balance there is on that, goes to Mr. Kirkevold. In other words, the balance that is left. Now, at the time—immediately after the fire, there was a period there that lasted, to the best of my recollection, from the time of the fire until about April of the next year, during which the sales on the merchandise, and the amount that was deducted was more than what Mr. Kirkevold had coming. In other words, he was showing a red figure on that, and we carried that red figure. There was no money paid directly but we carried that account. Do you see what I mean? We carried that account in the red, and to the best of my recollection it was either in March or April of the next year, before

(Testimony of James Milne.)

that account came out in the black, and Mr. Kirkevold received the money that he would naturally receive under current operations.

Q. Maybe you did not understand my question. I mean in making settlement that Mr. Kirkevold has made since the fire with the fur coat customers, did your company furnish financial assistance to him for that purpose?

A. No. Well, I think I just answered that question. I told you how the financial arrangement was.

Q. Oh, you say he was in the red?

A. That is right. There was a red figure which he did not [254] get any recompense for his month's earnings. We carried that red figure from month to month, up until about April, when it finally balanced out and he began to receive an income from it.

Q. And one of the principal reasons he went in the red during that period, was that he was paying out money to customers, making these settlements, is that right?

A. That is right. He did not have money to buy his stock to go back into business again.

Q. As a matter of fact, it was you and Mr. Velikanje that came to my partner's office, Mr. Cheney's office during his lifetime, and suggested that settlements be made with the fur coat customers, and these releases taken and so forth; that the matter be worked out in this general method.

A. I was in Mr. Cheney's office at one time regarding the payment of the policy, yes.

(Testimony of James Milne.)

Q. Well, what is the answer to my question, is it correct or not?

Mr. Velikanje: Well, I think——

A. I think the question was a little ambiguous to me, because I had no authority or anything else to make settlements for Kirkevold.

Q. Was Mr. Kirkevold present at that conference in [255] Mr. Cheney's office?

A. I do not think that he was, no.

Q. It was just you and Mr. Velikanje, and Mr. Cheney?

A. Yes, that is right. The reason I was over there that day, if that is the question, was due to the fact that——

Q. No, that is not the question as to why you went, but I am interested in what happened when you were there. Didn't you and Mr. Velikanje propose to Mr. Cheney at that time that to avoid a complicated interpleader suit brought by the insurance company, that you would go ahead and make settlements with the fur coat customers, and that a suit would be brought against the insurance company?

A. That is not as I recall it. As I recall it, there was an offer made of \$5,000 by the insurance company, and contingent on Mr. Kirkevold obtaining releases up to half of the amount of the loss, and I was over there at Mr. Cheney's request, and talked with him about it because we were naturally vitally interested in that being from a customer's standpoint.

(Testimony of James Milne.)

Q. Did Mr. Cheney request you to go over there?

A. Yes.

Q. Had you called him up on the phone previously?

A. I had never seen Mr. Cheney previously.

Q. Who made that suggestion or that proposal? Did it come [256] from you or Mr. Cheney?

A. It came from Mr. Cheney, as I recall it.

Q. Well, I am afraid his testimony is not available. Now, in this conversation with Mr. McKinley, you did not mean to testify, did you, that Mr. McKinley referred to this as a storage room on the mezzanine floor?

A. As I recall the conversation, Mr. McKinley told me that the company was only assuming a hundred thousand dollar coverage on the fur vault; that the store room on the second floor was not covered; that to the best of my recollection is exactly what he said.

Q. What did he call the room on the mezzanine floor?

A. As I say, I think he called it the store room, but I would not be positive of that now.

Q. You mean to say that Mr. McKinley said "Milne, that room is not a storage room?"

A. Mr. McKinley said that the store room on the second floor does not come under the limits of the policy as a storage room, as I recall it definitely, he stated it was because it didn't have a door across it.

Q. You don't mean the second floor, you mean the mezzanine?

(Testimony of James Milne.)

A. I mean the mezzanine, yes, sir.

Q. Did Mr. McKinley ever say that the second floor contained a fur storage room? [257]

A. I wouldn't say definite. He talked of a work room and a store room on the second floor.

Q. Did he ever refer to that as a store room on the mezzanine floor?

A. Well, it is my understanding that he did, because we discussed the question of whether the limitation of a work room and the question of a storage room at that time, and I do know that Mr. McKinley stated that in his opinion that was not a storage room; that if that is what we are getting——

Q. That is the point.

A. In his opinion, it was not a storage room. It was part of the work room. That was the discussion.

Q. All right. Now, prior to the fire, and if you don't know just tell us, but prior to the fire were furs kept on the mezzanine just temporarily until they could be worked on, or were they stored there permanently for the season?

A. I don't know. I was only there for a week, and I did not get into that far enough to be able to answer that.

Q. And do you know whether, after the furs had been repaired and worked on, whether they were put in storage in the storage room on the second floor, or not?

A. I couldn't answer that question either. [258]

Q. In other words, when you testified on direct examination that furs were stored there on the mez-

(Testimony of James Milne.)

zanine, all you mean by that is that you saw fur coats hanging there on the racks?

A. Yes. The room was full of fur coats, that is correct.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. Mr. Milne, referring to our conversation with Mr. Cheney, didn't we discuss with him the fact that we were—several people were threatening suit?

A. That is correct.

Q. And the store was having numerous complaints? A. That is correct.

Q. And that was felt, due to the fact that we were going to have to protect the good name of the store, Mr. Kirkevold was going to have to go ahead and make settlement or something had to be definitely done.

A. As I said, I was very anxious to have something done because we were having constant complaints.

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all. [259]

(Witness excused.)

Mr. Velikanje: We rest, Your Honor.

R. B. SINCLAIR,

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

Q. Your name is R. C. Sinclair?

A. That is correct.

Q. Where do you live at the present time, Mr. Sinclair?

A. At the present time Stockton, California.

Q. What is your occupation?

A. I am presently employed by the Pollock Stockton Shipbuilding Company.

Q. In what capacity?

A. I am the last end of their auditing department.

Q. You are what?

A. I am the last end of their auditing department. It is one of the war plants that is being closed out. [260]

Q. Do you have any connection at the present time with the defendant, the Home Insurance Company? A. None whatever.

Q. Or with the Fire Companies' Adjustment Bureau? A. None, whatever.

Q. When did you terminate your employment with the Fire Companies' Adjustment Bureau?

A. January 31, 1945.

(Testimony of R. B. Sinclair.)

Q. And you have had no connection with either company since that time? A. None, at all.

Q. You were formerly an adjuster at Yakima for the Fire Companies' Adjustment Bureau?

A. I was.

Q. And that bureau does adjustment work for numerous insurance companies, including the Home Insurance Company? A. That is correct.

Q. During what period of time did you do adjusting work with reference to this Barnes-Woodin fire on May 9, 1944?

A. From the date of the fire to approximately the 9th or 10th of July.

Q. And at that time you were transferred, I believe, to California, on the Port Chicago loss, and Mr. McKinley took over the work here? [261]

A. That is right.

Q. Was there any change in the situation of the premises there, from the time you first examined it until Mr. McKinley took over the adjusting work?

A. You are referring now to the fur department premises?

Q. Yes, referring to the premises.

A. There was material changes to the rest of the building.

Q. I mean in the fur department.

A. In the fur department, I would say the only change was the fact that some of the stock had been moved around from one position to another, and the racks—the moveable racks had probably been shifted but as to the interior construction, so far as I can

(Testimony of R. B. Sinclair.)

recall, there was no change—no repair work was done and so far as I know, nothing was torn out.

Q. No repairing or remodeling had been done until after you left? A. No.

Q. When did you first examine the premises after the fire? A. The next morning.

Q. Had you personally ever been in the fur department before the fire? A. No, I had not.

Q. And the last time you examined the premises before leaving [262] Yakima, did Mr. McKinley accompany you there? A. He did.

Q. That was some time in July, you say?

A. My recollection is that it was along the first part of July, yes.

Q. Now, just go ahead, Mr. Sinclair, and state what you observed on the mezzanine floor of the fur department, there, when you inspected the premises after the fire, with reference to the arrangement of the rooms, and if you wish to refer to the diagram there, why, you may.

A. Well, on my first inspection we had practically no lighting in the place. We went around there with flashlights, and so on, and it was not until a couple of days after that that I made a further inspection in that particular department. The floor had numerous racks—moveable racks, with some fur debris under them. Those——

Q. Pardon me, were these racks on wheels or casters?

A. They had wheels or casters of some sort, as I remember they could be picked up, anyway, and

(Testimony of R. B. Sinclair.)

I think they had casters or wheels on them. Those things had been obviously moved around by firemen, and everything was dripping wet. On this stairs,—the corner, the diagram there, which are not shown on the diagram——

Q. You mean in the upper left hand corner?

A. These stairs over here, the back stairs (indicating on map) [263] on my first trip I found quite a considerable number of fur coats which the firemen had thrown out on the stairs, and they were later, I believe, brought back into the mezzanine floor here, and in general on the first trip it was simply a mess, and it was that way for some little time.

Q. Well, we are principally interested in the arrangement of the rooms, if any.

A. I wouldn't say there was any racks at that stage of the game, because here we had along this closed-in rack, and along this closed-in rack, of course, there were things hanging there, and then there were these moveable racks were around haphazard. If I recall rightly, there were some in here, and I am quite sure there were some back here (indicating), and there was one or two removeable racks over here in what was apparently the work room end, and more or less coats piled around that were not on racks—I suppose knocked off and picked up—something of that sort.

Q. Were there any work tables or sewing machines working equipment there on the mezzanine floor in the fur department?

A. Yes.

(Testimony of R. B. Sinclair.)

Q. Where were they? [264]

A. The work tables were along here. I believe another table along here, and a sewing machine or two—I don't know exactly how much equipment was in there.

Q. Is that where the red mark has been made, marked with the——

A. Approximately that, yes.

Q. Were there any in this lower part w. t. at that time?

A. I believe there was a table in there. Whether it was a work table or not I don't know, but it seems to me there was a table with some coats piled on it.

Q. Were there any tables or working equipment at that time in the part that is marked here "store room?"

A. Not to my recollection.

Q. Is there any door at all to your left at the head of the front stairs on the mezzanine floor?

A. Not as I recall it, and it was merely an open arch. I didn't see any door, and I didn't see any evidence of any door having been removed.

Q. What is your estimate as to the width of that opening at the entrance of the sales room or show room, as they call it?

A. I would say that might be 8 or possibly 10 feet. That is guess work.

Q. And, was there any partition at all at the front of the [265] mezzanine, between the sales room or show room and the rest of the store to the front?

(Testimony of R. B. Sinclair.)

A. Not so far as this part of it was concerned. There was a railing there, a balcony rail and so forth across the front. Further back here, if my memory serves me, there was a plywood partition or something of that type. It may have been panel board.

Q. Was it there at that time after the fire?

A. Some of the remains of it were. Quite a little of it was there.

Q. Referring to the passageway between what is referred to as the sales room and the work room, was there any door of any kind in that passageway?

A. I don't recall.

Q. About how wide would you say that was?

A. About the width of an average doorway. Possibly 3 foot 6 or something of the sort.

Q. And did you ever discuss with Mr. Kirkevold whether there had been any door there previously before the fire?

A. I don't recall having done so.

Q. There was, I believe, what has been referred to as a catwalk along the front of the mezzanine floor.

A. I understood there was. Now, I didn't get out on that myself. [266]

Q. About how wide was that?

A. It was a narrow—just a passageway.

Q. How wide would you say, and what would you say approximately, were the dimensions of the portion of this room that is marked here on the map as a store room?

(Testimony of R. B. Sinclair.)

A. I don't think I can tell you that. I do not have sufficient clear recollection of the dividing lines. I could look at the diagram and guess at it, but it would not be testifying to a matter of knowledge.

Q. Did you have these pictures taken that are in evidence here?

A. I obtained the pictures. I did not have them taken. I don't know who ordered them first, but I was about to have pictures taken and learned Shepards had already made some.

Q. Shepard is a leading commercial photographer?

A. Yes, sir. I believe the representative of the Northwestern Mutual ordered the pictures in the first place.

Q. Did you have any conversation with Mr. Kirkevold during the course of your adjusting work there, in which the matter of the amount of insurance was referred to or discussed?

A. The only amount of insurance that was discussed during my connection with the loss was the \$10,000 coverage [267] outside of storage room.

Q. Just go ahead and tell us to the best of your recollection, in substance, what was your conversation with Mr.—or conversation, or say conversations with Mr. Kirkevold on the subject.

A. Well, I had many conversations with Mr. Kirkevold, and while we were making up a list of the destroyed and damaged coats, he expressed the fear that he was not going to have sufficient insur-

(Testimony of R. B. Sinclair.)

ance to take care of his loss. I think that the first time that came up I told him to wait until we got everything listed, and then would be time enough to commence to worry about it. Subsequently the subject was again discussed, and on one occasion he inquired if I thought that Mr. Orkney could influence the company in some way to perhaps extend the amount of that \$10,000 coverage. To that, as I recall, I told him that I did not know what Mr. Orkney could do. I rather doubted that, but he would have to find that out through Mr. Orkney.

Q. May I interrupt just a moment? You refer there to \$10,000 coverage.

A. That is the only item of coverage that was ever discussed with me in connection with this particular loss.

Q. Was that so stated by Mr. Kirkevold himself? [268]

A. Beg pardon.

Q. Was that so stated by Mr. Kirkevold himself?

Mr. Velikanje: Your Honor, I am going to ask for the conversation. I would like to hear the conversation.

Mr. Hutcheson: He does not have to give the exact words, but go ahead and give the substance of the conversation on that point, referring particularly to when this \$10,000 was discussed.

A. Well, it was discussed at practically all of the conversations we had.

Q. What was said about it?

(Testimony of R. B. Sinclair.)

A. It was simply an assumed matter that that was all we were discussing.

Q. Well, I don't mean what was assumed, but what was said about that.

A. I wouldn't attempt to make a verbatim report on it. I couldn't do it.

Q. We don't mean the exact words, naturally, but the substance of the conversation.

A. All right. The substance of one conversation was that Mr. Kirkevold was worried because of the fact that he thought the claim—the loss was going to exceed the amount of the insurance that he had. At another time, he [269] inquired if I thought Mr. Orkney could do anything with the company in the way of extending that coverage, at which time I told him that the practice of increasing the amount of the insurance after a fire was not a general one, but I did not think anything could be done, but that he could discuss it with Mr. Orkney. At another time——

Q. Could I interrupt there just a moment? You say, as to Orkney extending the coverage—extending the coverage beyond what did he say?

A. The coverage beyond \$10,000 that was under discussion.

Q. All right, go ahead.

A. At another time, Mr. Kirkevold was apparently in a more optimistic frame of mind, and he explained that he thought he could perhaps come out fairly nearly even if he could get a number of his clients to permit him to replace destroyed

(Testimony of R. B. Sinclair.)

coats, and that if he were in a position to replace the destroyed coats, at the cost to him, that by sacrificing his profit he would be able to reduce his loss as against the loss he would have to pay if he settled in cash. He inquired at the time if I thought that was a legitimate thing to do, and I informed him I thought it was perfectly legitimate.

Q. When you say reducing the loss, reducing what loss was [270] he referring to?

A. Reducing the loss he would have sustained over and above his assumed insurance collection of \$10,000, if he were compelled to reimburse the people in cash for the amount indicated by their receipts.

Q. At that time, was there discussed between you what the total loss was, approximately?

A. No, we had not arrived at that stage. When I left here we were making up figures in connection with it, but they were not completed.

Q. When you left, the adjusting work of the insurance company on this fire, had not been completed, had it? A. No, it had not.

Q. Do you recall anything else that was discussed on that point with Mr. Kirkevold?

A. I do not presently recall anything else. As I say, we had many conversations, and we were working from his inventory and the copies of the receipts making up a list, and occasionally we would stop in the middle of the work we were doing and converse for a few moments about his insurance situation. That happened on various occasions.

(Testimony of R. B. Sinclair.)

Q. Other than this discussion which you have mentioned as to trying to get Mr. Orkney to increase the coverage after the fire, was there ever any statement or assertion or [271] contention made by Mr. Kirkevold to you at any time that the amount of the coverage for this fire on customers' coats was more than \$10,000? A. Never.

Q. Never, or that this—or that there was a storage room on the mezzanine floor, did he ever make any such contention or assertion?

A. The question of storage room on the mezzanine floor did not come up at any time with me.

Q. Did he ever make such contention with you?

A. Beg pardon.

Q. Did Mr. Kirkevold ever make any such contention with you at any time?

A. Not to my recollection.

Q. Was there any fur storage room on the mezzanine floor? A. I don't know.

Mr. Velikanje: I object to that, Your Honor.

The Court: He may answer.

Q. Now, let's see——

Mr. Hutcheson: It is 12 o'clock, Your Honor.

The Court: We will go on for a little while.

Q. Mr. Sinclair, did you examine all of the receipts after the fire? A. I did. [272]

Q. And there are a few of these that are missing at the present time. By the way, from all that you saw you did not remove any of them, did you?

A. No, I did not take any with me.

(Testimony of R. B. Sinclair.)

The Court: Now, is there any dispute as to the missing receipts that require additional proof?

Mr. Velikanje: I had not thought so. It was not raised.

Mr. Hutcheson: I don't recall there was any evidence as to what the value of the missing receipts was. We would like to supply that proof.

The Court: Well, let the witness then directly testify to that.

Mr. Hutcheson: There are just a half dozen or so.

Q. Referring to the Carman coat, what was the value stated on the receipt?

A. What was the name?

Q. Carman.

A. One hundred and fifty dollars. It was Mrs. Red Carman, Wapato.

Mr. Velikanje: Mrs. Rex, I think it is.

Q. Same question as to the Moore coat, Mrs. J. E. Moore.

A. Mrs. J. E. Moore? [278]

Q. That receipt did not stipulate a value. Same question as to the Munsel receipt.

A. Mrs. C. E. Munsel, \$100.

Q. There was no receipt, was there, as to Odell?

A. Odell?

Mr. Velikanje: I think that was admitted.

A. Apparently not, I don't have it on the list.

Q. Same question as to the Stewart receipt.

A. Stewart—Mrs. Agnes M. Stewart, there was no value stipulated on the receipt.

Q. Same question as to the Elmer Thomas receipt.

(Testimony of R. B. Sinclair.)

Mr. Velikanje: What was that, Elmer Thomas?

Mr. Hutcheson: Or Mrs. Elmer Thomas?

A. Mrs. Elmer Thomas, there was a value of \$200 on the receipt.

Q. Same question as to the Verd receipt?

A. Verd, we didn't have a receipt on that item.

Mr. Hutcheson: That is all.

Cross Examination

By Mr. Velikanje:

Q. Mr. Sinclair, what was the reason you stopped the adjusting of this Barnes-Woodin——

A. I was transferred to California in connection with the [274] Port of Chicago loss.

Q. Didn't you have an accident up here?

A. I did. I had an automobile accident.

Q. What date was that?

A. I couldn't tell you. It was about 3 weeks before I left here, the latter part of June, if I remember rightly.

Q. The latter part of June?

A. That is my recollection.

Q. Then, you adjusted not up to July—it was only up to the time of your accident?

A. So far as this particular case is concerned, yes, that is true.

Q. Then, you were here from May 9th to June what, approximately?

A. About the 24th or 25th, I think it was, somewhere in there.

Mr. Hutcheson: His question is how long were you here?

(Testimony of R. B. Sinclair.)

Q. How long were you adjusting?

A. How long was I active on this particular loss?

Q. That is it, about June 24th?

A. Approximately that, yes.

Q. Now, you testified that you were never in this storage space on the mezzanine floor prior to the fire? A. That is correct. [275]

Q. About, after the fire when you came in here, there was nothing in this space except fur coats and some boxes of fur pieces that had been pulled off the top shelves?

A. Quite a bunch of debris of various kinds. I could not identify.

Q. It was all pretty badly burned?

A. Pretty badly burned.

Q. How about the back stairs?

A. The back stairs had a pile of fur coats on them that had been thrown out there, I presume by the firemen, wet, and in most cases burned to some degree.

Q. This is Exhibit 10. Would that be——

A. That is correct.

Q. Those were there at the time you——

A. Yes.

Q. Everything was pretty much of a mess in that department? A. Yes.

Q. It was pretty much impossible to tell where anything had been in the fire?

A. That is correct.

(Testimony of R. B. Sinclair.)

Q. Did you ever go over the insurance policy with Mr. Kirkevold?

A. I don't recall that I went over the policy with him. I did not have the policy in my possession. I had what [276] is called a daily report. That is, the agency copy of the policy, and was working from that.

Q. Did you read him over the provisions of the policy, I mean?

A. I do not recall that I did.

Q. Did you advise him that he had only \$10,000 coverage?

A. I don't know just what you mean by the term advised. We discussed this coverage and I told him he had \$10,000.

Q. You told him he had \$10,000?

A. And he told me the same thing, and Mr. Orkney told me the same thing.

Q. But, you never discussed the storage space with him? A. No.

Q. Who first brought up this \$10,000 provision?

A. Why, it was brought up when the loss was reported to me for attention.

Q. Who reported it to you?

A. I believe Mr. Orkney did.

Q. Mr. Orkney. That is the agent of the Home Insurance Company here? A. Yes.

Q. One of the agents? A. Yes.

Q. Now, you said that Mr. Kirkevold discussed with you [277] whether that coverage of \$10,000

(Testimony of R. B. Sinclair.)

could not be increased. Well, didn't he refer to the \$100,000 provision in the policy? A. No sir.

Q. What did he refer to?

A. He referred to the possibility of having Orkney securing an additional amount of insurance on him, on the second item of the policy.

Q. You mean, in the future?

A. No, I mean then. Understand, it was a question whether I thought there was any possibility of anything being done to help his situation.

Q. You mean, of re-writing a policy back?

A. Exactly.

Q. You mean to say he suggested re-writing the policy back?

A. I did not make that statement. I said he inquired of me if I thought there was any possibility of getting any action taken.

Q. Of increasing his coverage?

A. Yes sir.

Q. But, he did not say of re-writing the policy, or dating it back? A. Yes.

Q. He just spoke of increasing his coverage; is that right? A. That is right.

Q. Did you ever have any conversation with Mr. Milne of Barnes-Woodin Company?

A. I had numerous conversations with Mr. Milne.

Q. You were adjusting some of their other losses, too? A. That is correct.

Q. I am referring particularly to the Kirkevold loss.

A. I had conversations with Mr. Milne to this

(Testimony of R. B. Sinclair.)

extent, that he inquired of me immediately after the fire if I thought Mr. Kirkevold was going to have sufficient insurance to cover his loss, and at that particular time I told him that I didn't know, because we did not know what his loss was—we hadn't gone far enough along with it, and I don't recall any conversations subsequent to that in which Mr. Kirkevold's insurance was discussed with anyone, other than Mr. Kirkevold or Mr. Orkney. I do not discuss one client's insurance with another.

Mr. Velikanje: I believe that is all.

Redirect Examination

By Mr. Hutcheson:

Q. Did the point ever come up in your conversations with Mr. Milne as to what was the amount of the insurance coverage that Kirkevold had?

A. I don't recall definitely whether it was stated in dollars and cents or not. [279]

Q. But, as I understand it, in your conversations with Mr. Kirkevold, was or was not that ten thousand dollar limit of the coverage of insurance as to customers' coats referred to by both you and also by Mr. Kirkevold?

A. That is correct.

Q. By the way, as a result of this automobile accident, you were not hospitalized, were you?

A. No, I was not hospitalized, but I was compelled to stay at home. I injured my knees and couldn't walk. That is the whole story.

Q. And, as you have stated after the accident, some time in July, you again went to the store in company with Mr. McKinley?

A. Yes.

(Testimony of R. B. Sinclair.)

Q. To the Barnes-Woodin Store?

A. Yes, that is right.

Mr. Hutcheson: That is all.

Recross Examination

By Mr. Velikanje:

Q. Mr. Sinclair, you never discussed this insurance policy with me or any other attorney representing Mr. Kirkevold? A. Yes, sir.

Q. You never had any interpretation of the policy prior to [280] your discussion with me?

A. No.

Mr. Velikanje: That is all.

(Witness Excused.)

The Court: We will take an intermission now until 1:30.

(Recess.) [281]

1:30 o'clock p.m.

MRS. CHARLES VERD

produced as a witness on behalf of the defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

Q. Your name is Mrs. Charles Verd?

A. It is.

Q. Mrs. Verd, did you have the Barnes-Woodin

(Testimony of Mrs. Charles Verd.)

Fur Department make a fur coat for you prior to the fire of 1944?

A. Yes, my mother-in-law had a fur coat made for me.

Q. Let's see, who provided the fur materials to make the fur coat? A. My mother-in-law.

Q. And how many furs were there for that purpose? A. Well, I think there were 76.

Q. And she had bought those elsewhere, had she, other than at Barnes-Woodin?

A. In Alaska.

Q. And then, just for what purpose were they to be used—that is, to make a fur coat for her and also a fur coat for you? [282]

A. Yes, her coat was to be made from the backs, and mine was to be made from the part of the furs that were left.

Q. And had her coat been completed and delivered to her before the fire? A. Oh, yes.

Q. Where is your mother-in-law now?

A. She is in Seattle.

Q. And your coat had not been delivered to you at the time of the fire? A. No, it had not.

Q. Had you seen the receipt that had been issued by the Barnes-Woodin Fur Department with reference to that matter?

A. Well, I am sure there was a receipt given, but what it said on it I don't know.

Q. You don't have that receipt yourself?

A. No, I have not.

(Testimony of Mrs. Charles Verd.)

Q. Have you seen it since it was originally issued?
A. No, I don't think so.

Q. Did you ever see it yourself?

A. Well, I don't remember. I remember that there was a receipt given for the furs when we took them up there that day?

Q. You remember whether there was any value stated on the receipt? [283]

A. No, I don't know whether it was just for the number of furs, or what.

Q. You don't recall——

Mr. Hutcheson: I believe that is all.

Cross Examination

By Mr. Velkanje:

Q. Mrs. Verd, a settlement was made with you by delivering to you a new coat, was it not?

A. Yes sir.

Mr. Velikanje: That is all.

(Witness excused.) [284]

L. M. McKINLEY

produced as a witness on behalf of the Defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

The Clerk: Your name?

The Witness: L. M. McKinley.

Q. What is your occupation, Mr. McKinley?

A. Insurance Adjuster.

(Testimony of L. M. McKinley.)

Q. Employed by whom?

A. The Fire Companies' Adjustment Bureau of New York.

Q. And where do you reside at present?

A. 458 20th Avenue, San Francisco.

Q. And were you formerly employed by The Fire Companies' Adjustment Bureau at Yakima?

A. I relieved here in 1944—'44.

Q. You have been doing insurance adjustment work for approximately how many years?

A. A little over 35 years.

Q. With whom were you when you first examined the Barnes-Woodin Store after the fire in May, 1944?

A. Mr. R. B. Sinclair.

Q. And he had been doing the adjusting before that, and he [285] was being transferred to California, as I understand.

A. He was branch manager at this office and was transferred to California shortly after that.

Q. And then, you worked on the adjustment of this Barnes-Woodin Fur Department loss, from that time, while you were in Yakima, did you?

A. Yes. I took over about July 25th or 26th.

Q. And prior to that, earlier in the month of July, did you go to the Barnes-Woodin Store—the Fur Department there with Mr. Sinclair?

A. Yes, we made one or two trips. I went up there with him once or twice.

Q. He introduced you on one of those occasions to Mr. Kirkevold?

(Testimony of L. M. McKinley.)

A. I would not say positively that he introduced me to him.

Q. Now, would you just go ahead, Mr. McKinley, and just explain—referring to the map there if you wish, what was the situation as to the floor and rooms and so forth on the mezzanine at the Barnes-Woodin Store Fur Department.

A. This has been gone over very well. At the time I arrived there, that was in July, the furs were still on racks piled on tables. There was a lot of loose odds and ends—scrap, other than debris of coats, machines, sewing machines, work benches and this partition here (indicating) had been pretty well burned [286] out. It was a very light construction. Oh, I would say about two by three, the heaviest stud was. Just plyboard, apparently on it. Between—

Q. That is, the partition marked “P,” near the edge of the mezzanine?

A. That is correct. That is this one here. (indicating) These cases, I think Mr. Kirkevold used the term “bin” with regard to them, here (indicating), that were set around the edge of the sales’ space had been pretty well damaged and destroyed. Now, there was no evidence I could see of a door or door frame at this opening here (indicating).

Q. Referring to—first to the opening into the sales’ room at the top of the front stairs, about how wide was that?

A. This opening was about—oh, it is between 8 and 10—7 to 9 feet I would say, not quite 10.

(Testimony of L. M. McKinley.)

Q. And was there any evidence of a door or anything of that nature at the opening between what is referred to here as the sales' room and the work room?

A. There was neither a door or evidence of a frame for a door on that opening at the time I saw it.

Q. And about how wide was that opening?

A. It was about—close to three six.

Q. Three feet 6 inches? [287] A. Yes.

Q. Referring to the north and west sides of the sales room, were there any walls there, or were those just show cases?

A. Well, there was a built-up case I believe. They went practically to the ceiling. They did form a brake at those points. However, you could stand at this point here (indicating) and see clear through to the other—to the other end of this work and fitting room they called it, while I was there.

Q. You say that this room that is marked work room, was that ever referred to by any name by Mr. Kirkevold himself in your talks with him?

A. No, not other than the work room back there, and fitting rooms, generally. I believe they fitted there also is my understanding I got from the thing.

Q. Did you get that understanding from Mr. Kirkevold?

A. He is the only man I ever discussed it with.

Q. Is that what he called it in talking to you?

A. Yes.

(Testimony of L. M. McKinley.)

Q. While we are on that point, did Mr. Kirkevold ever refer to that as a storage room, and if so, what?

A. I cannot recall him of ever discussing it as a storage room. [288]

Q. What did you observe as to the location of any work tables or sewing machines, or working equipment on the mezanine?

A. Well, there was tables along the windows here (indicating)—we will say work table in this general neighborhood here. I would not say that is the exact location. There was a sewing machine about in here, as I recall it (indicating).

Q. That is, these red marks that have been placed there that day “w.t.” written three times, are those approximately correct?

A. There were tables along that general area there.

Q. Was there anything in that part of the map marked “store room”?

A. Well, now, just as to whether that was 2 feet from this, or more over this way, my recollection of it would place it more over this way (indicating)—out toward this (indicating), but back in here, this is not wide enough for any great amount of—

Q. What is the width of the portion of the building there that is referred to as store room, the northern and southerly direction, which would be up and down on the map?

A. That is about 9 to 10 feet by 16 to 20,

(Testimony of L. M. McKinley.)

there. This, of course, here, (indicating) there is only about,—that is a little over 8 feet at most. It will probably be 10. [289]

Q. The width you have stated, does that include the catwalk, in addition?

A. No, that is not in addition to the catwalk.

Q. Approximately what was the width of the catwalk?

A. The catwalk was about $2\frac{1}{2}$ feet. I never measured that. In fact, I never measured any of these except paced them at times.

Q. Was there a door at the point indicated here, between what is called on the map the store room and the back stairs?

A. Yes, there was. In fact, that was the first time I went in, if I recall, I went in through that door.

Q. And is the location of the door shown correctly on that map there?

A. I don't place it as being right against the corner there. It is my recollection that it is a little bit further along. There is not much difference.

Q. A little further towards the west or left?

A. To the west, yes sir.

Q. Was there any partition or wall, or line of demarkation of any kind whatsoever, between what the plaintiff has marked there work room and storage room?

Mr. Velikanje: I think that is admitted, Your Honor. I don't think there is any dispute on it.

(Testimony of L. M. McKinley.)

A. I would have a hard time saying where one began and—— [290]

Q. To all appearances, was it or was it not one single room? A. I considered it such.

Q. Did you, from your observation, was there any fur storage room on the mezzanine of that building?

Mr. Velikanje: I object to that, Your Honor.

The Court: He may answer. Objection will be overruled.

A. Not in the sense that the interpretation of the policy that I had——

Mr. Velikanje: I object to that. I am objecting to his interpretation.

The Court: No, his interpretation of the policy—just go ahead and explain what you mean.

A. The copy of the policy—the policy in my possession, contained limitations. One, being for one hundred thousand for stock in vaults, fur storage room, and I believe there is one other definition. The other was vaults outside. Well, naturally my first duty was to determine where this stock was located, if it were in the fur storage room it would come under one heading. If it were outside, it came under the other.

The definition generally of the room, as we have given this here—rather, this area, is really no different than it would be if it were piled anywhere throughout the mezzanine, or over at any place in the [291] general store room. It was open to the

(Testimony of L. M. McKinley.)

general public. That is, there was nothing to stop a person from going in a fur storage room.

Mr. Velikanje: Your Honor, I am going to object to this line of testimony. I do not believe it is proper.

The Court: Objection will be overruled.

Mr. Velikanje: Note an exception.

A. The fur storage room, in the contemplation of the policy, and I have had a good deal of experience in my marine losses, naturally, meant a place for safekeeping, where things would be stored with some degree of certainty that they would not be open to robbery, theft, ordinary carelessness of passersby—employees, so I immediately took that stand that it was—this was not a fur storage room.

Q. Did you ever make a statement to Mr. Milne or Mr. Kirkevold that there was any storage room on the mezzanine floor?

A. I don't recall any discussion with Mr. Kirkevold over it. Our relations were very pleasant, and after taking a non-waiver agreement so I could go forward without hurting the company's interest in any way, he and I identified some one hundred and thirty, I believe, out of a hundred and sixty damaged garments there, and placed [292] most of the owners.

Later, Mr. Milne and I had a conversation at the store. It was generally very much to the effect that he gave in his testimony, so I won't repeat it, but I will say this, that he further argued that the entire store was a storage room.

(Testimony of L. M. McKinley.)

Q. Did you agree?

A. Any place in the store was a storage room or store room, I think was the term he more properly used.

Q. Did you agree or disagree with that?

A. I disagreed with it as a storage room.

Q. You heard the testimony of Mr. Sinclair this morning as to the value that appeared on the receipts that are now missing. Did you, after you took over the adjustment, did you check over those, and,—

A. I checked.

Q. Was his testimony correct as to those figures?

A. Mr. Kirkevold and Mr. Velikanje very kindly let me have the receipts. I had them long enough in my possession to check the same list and Mr. Sinclair and Mr. Kirkevold and I checked the values, and they were in order.

Q. Were the values testified by Mr. Sinclair today, the values stated on those particular receipts?

A. Yes, they were. Of course, there was one that was not there. [293]

Q. Showing you this photograph, defendants' identification "B", did you have Mr. Shepard take that picture? A. Yes.

Q. Will you just explain where that is, and just what that shows?

A. Yes, I can do it best from here. I did it more as a confirmation of this value thing. This line—correct me if I am wrong, this is west, is it not?

The Clerk: North.

Mr. Velikanje: This west, and this is north.

(Testimony of L. M. McKinley.)

Mr. Hutcheson: On the map west is to the left.

A. Then, this is north. This line here, are the line of bins that is on the space now, bins, or show-cases, that——

Mr. Velikanje: Are those chalk marks where you put down there?

The Witness: No, those are the marks on the floor that were left by the pieces of furniture when they were moved. This was done—I guess it must have been along in October, at the time they cleaned that off for reconstruction of the mezzanine, and when they cleaned it off I noted these, and it occurred to me that it would have some value, or might be, in case of any further difficulty was regard to this claim. They were not brought out in any way. They are just as it stayed. [294] It is common whenever you have a piece of wood down on the floor, nailed down for months, take it up, and you will always have those lines.

Mr. Hutcheson: Just go ahead.

A. (continuing): As you will note, this is V-shape, here is where the mirrors were. This is the opening here, and this is where the ends of the cases—just about this part of them, where they run back to the catwalk.

Now, you will note these start down about here, where there is the—there was a doorway, and a—well, I don't know how that was finished there. I would not attempt to describe it.

Q. This picture was taken at a later date than the other pictures?

(Testimony of L. M. McKinley.)

A. Yes, yes, not until the furniture and mezzanine was cleaned out for the new construction work.

Q. In other words, these showcases had been removed prior to the taking of their——

A. Oh, yes, because these are the marks where their base stood.

Mr. Hutcheson: We offer it in evidence.

Mr. Velikanje: I think it is immaterial, Your Honor, as to showing what is involved in this case.

Mr. Hutcheson: Since there is a question——

The Court: It will be admitted in evidence.

(Whereupon, picture referred to was then received in evidence and marked Defendant's Exhibit "B".)

Q. You have been engaged in the insurance business, you say, for over 30 years?

A. It will be 50 years on the 6th of next month. I hate to admit it.

Q. In the insurance business, does a local agent of an insurance company have any authority to change terms or conditions of an insurance policy?

Mr. Velikanje: I am going to object to that, Your Honor.

The Court: I think probably the question is wrong.

A. It would be too involved to answer, Sir.

Mr. Hutcheson: Well, we offer to prove that the answer would be in the negative.

Mr. Velikanje: What was your Honor's ruling?

(Testimony of L. M. McKinley.)

The Court: I sustain the objection to that on the ground that it calls for a legal conclusion.

Mr. Hutcheson: I think that is all. [296]

Cross Examination

By Mr. Velikanje:

Q. Mr. McKinley, referring to this exhibit "B", I believe it is, can you show on this plat where this picture was taken from?

A. Yes, the camera was centered at just about this point here (indicating).

Q. And looking towards the east?

A. Looking towards the——

Q. Looking towards this side of the map (indicating)?

A. Yes. Well, this is Third Avenue and looking towards Fourth, that is the way it is.

Q. Towards the east. This would not show the storage space in back?

A. No, that is back up there.

Q. I say, this picture has nothing to do with that storage space?

A. Not up to this tail end.

Q. It was back in this—well, if it is just back——

A. Yes, it was, too.

Q. Just back of this door, was it not? I mean, where the bottom of this picture starts, just back of the showcase frame? [297] A. Yes.

Q. And this space between these two marks would be the doorway?

A. There was no opening, any more than there is between——

(Testimony of L. M. McKinley.)

Q. I mean, previous to that time—previous to that time these two marks would indicate where that doorway had been?

A. There was no doorway there.

Q. Let's say an opening there.

A. There was an opening there between the ends of the two cases.

Q. All right, but there was a passageway through there? A. A passageway.

Q. That went——

A. The first time I saw it, as I recall, there was a pole and remnants of a curtain there.

Q. By the time you saw it, things had been quite well—a lot of things had been cleaned up, had they not?

A. You mean the first time I saw this?

Q. Yes.

A. Those pictures were taken immediately after the fire, there had been practically nothing cleaned.

Q. Weren't quite a few of the coats you looked at upstairs in the beauty parlor space, hadn't they been moved up in another location and hung? [298]

A. Where is the beauty parlor space?

Q. Up off of the elevator, on the east of the elevator as you go up on the second floor?

A. The elevator? Now, wait a minute, you go up the stairway. At that time there was a hat shop directly across.

Q. That was on the mezzanine. Then, you go up that same stairway, at the top.

A. There was nothing up there at all.

(Testimony of L. M. McKinley.)

Q. You don't remember seeing those coats up there?

A. There was nothing up there. In fact, as I say, except for about 30 that we couldn't find and which were explained as having been thrown out in the alley, or down on that stairway and then thrown out by the Fire Department, all of the coats were right in there and identified, and——

Q. Some of the coats were so far gone there was just a few ribbons hanging over the hangers, were there not?

A. There was hardly a coat there but what there was sufficient not only to identify, but many of them you could tell a great deal about them.

Q. But, you agreed with us at that time there was no salvage in them?

A. No, the cost of handling what little salvage that would have been there, I considered——

Q. Wouldn't consider the salvage? [299]

A. Warrant the offset of any values, and again, we only had \$10,000 at stake in my——

Q. You and I had several discussions on that, did we not? A. We did, I believe, yes.

Q. And we disagreed very emphatically?

A. Yes, along the same——

Q. And I advised you that was the first time I had been brought into the matter is that not correct?

A. Yes, I believe you told me. I think I talked to you before I went over to Mr. Kirkevold's as a matter of courtesy, I came to you.

Q. And I think we both went over and went

(Testimony of L. M. McKinley.)

through everything that was there, and let you have all of our records? A. You did.

Q. Did I not ask you at that time why Mr. Sinclair had not raised this question of storage room?

A. I don't think so, Mr. Velikanje.

Q. Didn't you advise me because of the accident Mr. Sinclair had had, you had had a little trouble in getting some of the information and things from him?

A. It might have been that you did ask. I don't recall it.

Q. But, you did have some trouble in getting some of the records and things Mr. Sinclair was working on?

A. Well, he had them at home. They had left the office.

Q. Did you discuss with me or Mr. Kirkevold, about these [300] certificates that were issued?

A. No.

Q. Hadn't I——

A. There is nothing of any import that comes to my mind.

Q. Hadn't you shown your inclination to pay those direct to the certificate holders?

A. Well, I believe they would have to be paid direct to the certificate holders.

Q. But, had you not communicated with them and told them they were going to pay them?

(Testimony of L. M. McKinley.)

A. Some of them I believe filed proofs. I don't know.

Q. And then after—some time after our first meeting you raised the question as to whether those would come under the limitations of the policy?

A. I did not raise it. That is a matter of the company's. That was beyond my jurisdiction—my prerogatives ended before that.

Q. Mr. McKinley, I hand you plaintiff's identification 11. Is that your signature to that letter?

A. That is correct.

Q. That letter was written to one of the certificate holders? A. That is correct.

Q. And similar letters were sent to all of the certificate holders? [301]

A. Now, wait a minute. Yes, it was, that is correct.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: Objected to as immaterial, irrelevant and improper.

The Court: The objection will be overruled.

(Whereupon, letter referred to was then received in evidence and marked plaintiff's exhibit No. 11.)

Q. Mr. McKinley, from the information you were able to obtain, what was this space marked "store room" used for?

A. It apparently had been used for a reception place for garments brought in as they were being processed and passed for storage.

Q. Well, those garments were stored——

(Testimony of L. M. McKinley.)

A. Incidentally, there were other findings, and stuff brought in there.

Q. Such as what? A. Oh——

Q. Except there were these.

A. There were findings, was the only word I know would cover just the small stuff you would find around a work shop of that kind.

Q. There were fur pieces?

A. Loose furs and scraps and so forth, and tape and stuff of [302] that kind. I don't know. I didn't pay much attention to it.

Q. That was in July?

A. It was in July.

Q. You don't know what that was like prior to the fire? A. I couldn't tell you, sir.

Q. But, isn't it a fact that from the information you were able to obtain, that that space was used for the storage of furs?

A. It would not be used for the storage of my furs in this climate.

Q. Weren't they using it for that purpose?

A. No. As I was given to distinctly understand by them, they were there during the period in which they were being processed before storage, and placed in storage.

Q. Before they are placed in the storage upstairs? A. Yes.

Q. If a coat was there for a month, did you not understand it was left down in this space before they were able to get to it? A. No.

Q. Who told you otherwise?

(Testimony of L. M. McKinley.)

A. Well, simply—no one told me one way or another. I don't know what their conditions were with regard to their labor there. [303]

Q. But, your statement to me and to Mr. Kirkevold was that in your opinion, that was not a storage room? A. Correct.

Q. And you don't remember any statement made by me to you asking why Mr. Sinclair had not advised us of that?

A. No, I don't really recall that, Mr. Velikanje. That is further impressed upon me by the fact that if he had had this condition come up, he would have done just what I would have done, of what I did, refuse to proceed any further without a non-waiver agreement. That is one of our absolute rules.

Q. A non-waiver agreement was signed by both parties?

A. At my request, when this hundred thousand dollar business was brought up to me. That was signed by me, if I am not mistaken.

Q. I hand you plaintiff's identification 12. That is the extension you gave us, did you, to the period of time we were trying to adjust this matter, is that not correct?

A. This was an extension of time for filing proofs of loss. That is not the non-waiver I spoke of.

Q. But, a non-waiver agreement was signed between the parties? A. Yes.

Mr. Velikanje: I will offer that in evidence.

(Testimony of L. M. McKinley.)

Mr. Hutcheson: No objection. [304]

The Court: It will be admitted.

(Whereupon, extension referred to was then received in evidence and marked plaintiff's Exhibit No. 12.)

Q. Mr. McKinley, you refer to the work table that you stated was out in that room when you saw it in July. That table was not nailed down, was it?

A. Oh, no.

Q. That was just a fairly small moveable table?

A. Well, it was—oh, about three six feet, from about three and a half in width, larger than the small ordinary desk.

Q. But, this space you testified, what has been called the store room on this map, was approximately ten by twenty, isn't that what you stated?

A. Oh, no, it is a little bit—from—this is about—I would say that is eight feet by about six, and from this point on here, you have got—that is about fifteen by ten, from there on.

Q. Fifteen from that point? I hand you plaintiff's identification 13, is that the non-waiver agreement testified to?

A. Correct.

Mr. Velikanje: We offer it in evidence. [305]

Mr. Hutcheson: No objection.

The Court: It will be admitted.

(Whereupon, non-waiver agreement referred to was then received in evidence and marked Plaintiff's Exhibit No. 13.)

A. I signed a duplicate.

(Testimony of L. M. McKinley.)

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all.

The Court: When you were assigned to the adjustment of this loss, which was some substantial period after the loss had actually occurred—probably 60 days or more.

The Witness: Yes.

The Court: Did you take up the work that your predecessor and adjuster had done, or attempt to take it up at the point where he left off?

The Witness: Well, his work had broken off very carefully at a very natural point. He had inventoried the merchandise in the storage vault upstairs for the purpose of avoiding any duplication, or the possibility of something creeping into the list burned downstairs that we found up there. That part had been checked very carefully, and all the undamaged garments checked and at that point it had stopped. [306]

The Court: Had his work gone to the point where in his own judgment he determined the nature and extent of liability under the policy?

The Witness: As set forth by the policy, yes, sir.

The Court: And you were advised of his position as to that matter.

The Witness: Well, yes, in this much that we simply turned it over and said “there is the loss, and here is the copy of the policy.”

The Court: The issue as to whether this was an incendiary fire was never involved in this case?

(Testimony of L. M. McKinley.)

The Witness: I never heard a thing to that extent?

The Court: The issue as to whether or not there was a fraudulent proof of loss being made was not involved.

The Witness: No, I think I have always found the intent there to be very——

The Court: Well, then, the issue of liability on this policy under the rather peculiar and unusual provisions that it has, were you advised of that by your predecessor before you went onto the job?

The Witness: Merely to the fact that here was a loss, and it was—I asked storage vault—storage—— [307]

The Court: What I am trying to get at, did he advise you that in his judgment much of this loss occurred in the place that could not be classified as a storage room or vault, or a safe?

The Witness: No, other than it was outside of the storage vault. That is the only thing he said, and I took right on.

The Court: Well, that would be almost an affirmative answer to the question I asked you. It was his construction that the property that was destroyed or lost by the fire——

The Witness: Oh, yes.

The Court: (Continuing): Was outside the storage room vault or safe.

The Witness: Yes.

The Court: Those are the words.

The Witness: Yes, that is.

(Testimony of L. M. McKinley.)

The Court: Therefore, would fall under this minimum liability of the policy, rather than under a maximum limit of the policy.

The Witness: Correct.

The Court: Well, did you go on the job then with the purpose of determining that question again on your own initiative, independent—

The Witness: Absolutely. [308]

The Court: (Continuing): Independent of what he had told you.

The Witness: If I might digress for a moment, for instance, he stated to me that he did not see the necessity of my going forward and checking the merchandise destroyed, as the amount involved—and this confirms what you have put before me, that the amount—limit of liability would not be met, the insurance loss, and I said, well, I would go forward with it anyway, because after all this is a policy that is written for the benefit of third parties, and we have obligations there and must watch that.

The Court: But, you did not accept his conclusions in that regard.

The Witness: No, I did not.

The Court: And then you looked the ground over again to ascertain whether this would be a storage space or storage room, or what?

The Witness: Yes, I spent a couple of days up there.

The Court: You realized the major issue in this controversy was that?

The Witness: Oh yes.

(Testimony of L. M. McKinley.)

The Court: That issue. [309]

The Witness: Yes, sir, and that is the reason I took that non-waiver agreement as soon as that came up. I wanted to go forward with the work, but I did not want it in any way to stop the company from any proper defenses.

The Court: Did you discuss it with the local agents?

The Witness: I saw Mr. Hargraves a few times—or Mr. Orkney, but did not go into any detailed discussion with him over that part.

The Court: You did not ask him if—what if any degree of familiarity he had with the arrangement that was prevailing?

The Witness: No, I did not, as I recall to this extent, Mr. Orkney is not very familiar with these inland marine policies. They are not written in these offices. The local agencies have to send in proposals and rates are made, and the policies are usually written at a central office and mailed for local signature.

The Court: But, you appreciate of course that he was the local agent, and his knowledge was the knowledge of the company—in that of the insurance company.

The Witness: Yes, it would be. I should imagine that is a matter of law. I would not pass on. [310]

The Court: But, you did not discuss with him, you say, at all, anything in connection with the origin of this insurance and the changes that might

(Testimony of L. M. McKinley.)

have occurred from the time the original application was made and the original coverage was issued, and the time that the loss occurred.

The Witness: No, I did not go into any detail of that.

The Court: Because this was a contract of insurance that was indefinite in the matter of time, and dependent on the payment of premiums—I think that is all.

Redirect Examination

By Mr. Hutcheson:

Q. You used the term “inland marine insurance.” Just for my information, what does that term mean?

A. As distinguished from fire insurance, a good deal of it, I would say, is a statutory definition by your state. It applies to policies covering hazards other than those included in a fire insurance policy. Normally the location is widened or broadened. In this case, it covers theft, mysterious disappearance, and an accidental damage to the coat. A woman is out— [311] gets out of a car, snags her coat and tears it, it is covered under your inland marine policy, where it would not be under a straight fire policy with its limiting form.

Q. That is assuming that it is at a location that is covered, of course? A. Correct.

Q. In other words, it is somewhat broader coverage than a straight fire policy?

A. It covers more hazards of ocean marine.

(Testimony of L. M. McKinley.)

Q. Referring to the point that his Honor brought up, as I understand the contention of the insurance company, that the liability here was limited to \$10,000 because this was not a storage room on the mezzanine floor. As I understand it, that conclusion was reached by you, but it had previously been reached while Mr. Sinclair was on the job, is that statement correct or not?

A. Well, yes, Mr. Sinclair reached it also.

Q. It was not a new idea on your part, you don't mean that, do you?

A. Well, I can only answer that, no. It was not a new idea. I did not invent the thing, no. It is a condition which spoke for itself.

Q. Were you ever told by Mr. Kirkevold or by anyone else, prior to the trial of this case, that there had been any [312] changes made of any kind after the issuance of the policy, and before the fire?

A. No, it would have made no difference to me, anyway, because——

Q. Why?

A. Because those are conditions. They are made conditions under which those policies are issued, or represented to a company, and as long as those conditions do—the conditions upon which they cover continue, he might have moved next door, this policy would not—and the agent might have known it, but the policy would not automatically have followed him, or at least I wouldn't——

Mr. Hutcheson: I believe that is all.

(Testimony of L. M. McKinley.)

Recross Examination

By Mr. Velikanje:

Q. Mr. McKinley, if this is on representation, on information, why was this policy written with the words "store rooms," plural—why wasn't it written with the word "storage room."

A. Those policies at times will cover. I happen to know one that is written for \$2,000,000, and there are dozens of rooms, and it is on this same form. This form was not especially printed for Mr. Kirkevold. It is national in use by all of the large furriers. [313]

Q. Do you know if the Home Insurance Company ever explained that to Mr. Kirkevold?

A. They did not print a special form for him.

Q. Yes, or that this——

A. (Continuing): I don't imagine they would.

Q. Or that it was limited to one room.

A. Now, you are asking me to——

Q. Well, you don't know what was done at the issuance of this policy, or subsequent thereto up to the time you came into the matter?

A. No, but I can read English.

Q. You stated that Mr. Sinclair had completed his inventory. Why then did you go back and go over all of those coats?

A. I did not say that he had taken an inventory downstairs. I said that he had completed an inventory of the storage room.

Q. I thought that in response to the Judge's

(Testimony of L. M. McKinley.)

question that you had stated that he had completed——

A. He had upstairs. I went back and inventoried this burned and damaged stuff on the lower floor.

Q. Mr. Sinclair had not completed it enough to know what the actual loss was, had he?

A. He had not done any inventory on that floor.

Q. So it was not known to be under the ten thousand, or what [314] it was, except a guess?

A. Yes, it would, because the condition of that merchandise was such as I told you. It was very little salvage can be considered, and when by elimination he determined what merchandise in storage had not been damaged, simple arithmetic would give him the difference between that figure and the burned lot downstairs. That is elemental.

Q. Did he give you the elements from his simple arithmetic as to what that damage was, what the extent of it was?

A. They had made up their list there, something around \$30,000 as I recall. I think that list of his runs around that.

Q. Is that his list or our proof of loss?

A. No, the list that he and Mr. Kirkevold made up—the one that he was speaking of in regard to that Verd file.

Q. When did Mr. Sinclair express to you that this was under the \$10,000 provision?

A. Oh, let's see. To tell you the truth I never discussed this thing very much with Mr. Sinclair.

(Testimony of L. M. McKinley.)

Mr. Velikanje: That is just what I thought.

(Continuing): Very little.

Q. Didn't I express to you that you would take the attitude that was not a storage room?

A. Yes sir, you did, and I was very much surprised when you [315] took the attitude.

Q. But, that question, so far as you and I were concerned, had never been raised before, had it?

A. Not to my knowledge, it never had.

Q. And you state now you had not discussed it very much with Mr. Sinclair?

A. Well, that is quite true, exactly what I said.

Q. Do you know why Mr. Sinclair had not taken a non-waiver agreement?

A. No, I never asked him. I said I had not discussed it to any great extent with him.

Mr. Velikanje: That is all.

Redirect Examination

By Mr. Hutcheson:

Q. Counsel asked you a moment ago, he said as far as you were concerned that is the first time the point ever came up. Had you ever discussed that before, that occasion he is referring to?

A. I don't recall whether one or two conferences I had with him. I think the first one we discussed it over in his office. I think probably I called the second time, didn't I, Mr. Velikanje?

Mr. Velikanje: I think we were two or three times together. [316]

Mr. Hutcheson: That is all.

(Witness excused.)

Mr. Hutcheson: We offer in evidence this original release. There is no objection, is there?

Mr. Velikanje: No objection.

(Whereupon, original release referred to was then received in evidence and marked defendant's Exhibit C.) [317]

JAMES W. ORKNEY,

produced as a witness on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

The Clerk: Your name, please.

The Witness: James W. Orkney.

Q. Your name is James W. Orkney?

A. That is right.

Q. And you were a member of the firm of Hargraves and Orkney, insurance agents of Yakima?

A. That is right.

Q. And you have been engaged in the insurance business about how many years, Mr. Orkney?

A. Fifteen.

Q. This insurance policy involved in this case was written through you as agent, was it?

A. It was.

Q. Showing you plaintiff's Exhibit 8, this little notebook and record of insurance, you prepared that and gave it to Mr. Kirkevold, did you?

(Testimony of James W. Orkney.)

A. I did.

Q. Was there any intention in doing that to make any changes in the policy limits or coverage of the policy issued by [318] the Home Insurance Company?

Mr. Velikanje: I am going to object to that as to what his intent might be.

The Court: Oh, he may answer. Objection will be overruled.

A. Well, the reason this was issued was merely as I recall, that is Meryl Kirkevold told me that he did not understand exactly what he had in coverage, because he would allow his premiums to run behind on certain coverages, and frequently I would go over and ask him for them, and as I recall, the reason for this being issued was because he wanted to know what he had.

Q. You have not answered my question. I say, in preparing and giving him that, was there any intention on your part to make any changes in the policy limits, or the nature of the coverage under any of his insurance policies?

A. No, there was not.

Q. Showing you defendant's Exhibit A, this is the application under which this insurance policy was issued, is it, that is involved in this case?

A. Yes, it is.

Q. It was prepared by you in Mr. Kirkevold's presence, was it?

A. Yes, I am quite sure it was in his presence.

Q. He has testified that in two places it contained

(Testimony of James W. Orkney.)

his [319] signature, and I will ask you whether that is your signature on the back of it.

A. That is my signature.

Q. Yes. Did you discuss the matter with him at the time that you prepared and he signed the application?

A. Well, the reason this application was prepared and the policy issued, it was previously in another company and they could not handle that large a capacity, and whether or not I prepared this in his presence I would not be able to say, but I do know that he signed it.

Q. He signed it in your presence, did he?

A. Yes.

Q. I noticed that it states in here in storage as to the limits in storage enclosure, \$100,000. Outside storage enclosure, \$10,000, and that figure \$10,000 appears to have been changed. Did that originally read \$5,000 or some other figure?

A. Well, I think it must have. I can't recognize whether or not that is my writing. It must be, but——

Q. What conversation if any did you have with Mr. Kirkevold at the time as to the amount of that figure. That is, did you make any suggestion to him or was there any conversation about that?

A. Well, I am sure this policy—the reason I can't be too sure of this is because I have not had it daily since [320] the time of the loss, but I am sure this policy was originally written \$5,000 outside of storage enclosure, or whatever it reads,

(Testimony of James W. Orkney.)

the rest of the store, because later I know I raised it to ten thousand.

Q. Frankly, I will show you the policy to refresh your recollection. I rather think it was ten thousand when that policy was issued. Will you just refresh your recollection on that?

A. You are right, it undoubtedly was. The previous policy then, at the time this was written.

Q. Did you make any suggestion to Mr. Kirkevold as to increasing that figure from the five thousand to the ten thousand? A. Yes, I did.

Q. Tell us what was said about that.

A. Well, naturally, I can't remember the words, but——

Q. The substance of it.

A. As I recall it—you can tell I am not too fresh, because I thought I raised this policy, but as I recall it, I suggested that the coverage be raised to ten thousand. The cost of the insurance would not be any extra, and he was starting to handle more expensive coats, and had increased the amount of work on fur coats that he did.

Q. You say you made that suggestion, and what did he say? [320]

A. Well, I couldn't testify to that. I know he raised it, that is all I know.

Q. Anyway, he consented to making that ten thousand?

A. To give a better explanation of that, I had Mr. Kirkevold's insurance in two locations prior to Barnes-Woodin, and at those locations he did have

(Testimony of James W. Orkney.)

the five thousand, and when he moved to Barnes-Woodin his business developed—increased.

Q. And in any event he consented to that figure being ten thousand and the policy was issued that way? A. That is right.

Q. The policy was issued—was it issued by you here, or was it issued at the Seattle office of the company?

A. Well, the policies were never issued by us, these type of policies.

Q. Inland marine policies, you have no authority to issue policies of that nature?

A. No, I have not.

Q. They are issued at the Seattle office, you say?

A. This particular company, they are issued at the Seattle office. I could not swear on the Bible to that, but I am sure they are.

Q. Anyway, they are not issued here?

A. No.

Q. In the preparation of that application, Mr. Orkney, did [321] you write down anything but what was satisfactory to Mr. Kirkevold in accordance with his desires to the best of your knowledge?

A. Well, no.

Q. Beg pardon.

A. I don't believe there was any objection to anything. I would, if you want a conclusion I have made here, I probably had the previous policy at five thousand and started to issue this at five, and raised it to ten at the time I made this out.

(Testimony of James W. Orkney.)

Q. And so far as you know, was everything in the application satisfactory to Mr. Kirkevold?

A. Well, yes. I can't say he read it over carefully or anything of that sort, because very few policy holders do.

Q. When the policy was issued—or strike that. When you received this application, I take it you sent it into the Seattle office of the company?

A. That is right.

Q. And then they returned the policy to you within a few days?

A. Well, they returned it to me, I couldn't say whether it was a few days or when.

Q. Later, they returned it to you, and then——

A. That is right. [322]

Q. And, on—at least within a month or so after the application, you delivered the policy to Mr. Kirkevold, did you?

A. I am sure it was in that length of time.

Q. And Mr. Kirkevold, so far as you know, has never expressed any objection to the method to which you prepared the application, has he, to your knowledge?

A. No, those things are written one day and forgotten the next.

Q. But, you do not know of any objections that were made? A. No.

Q. Do you have any personal knowledge, Mr. Orkney, of any changes having been made in the Barnes-Woodin Fur Department after this policy

(Testimony of James W. Orkney.)

was issued and the application sent in, until the time of the fire? A. Say that again.

Q. Do you have any personal knowledge of any changes having been made in the Barnes-Woodin Fur Department after the issuance of this policy, and before the fire?

A. Well, I couldn't say either way, because this Fur Department changed hands several times during the time I had the insurance on it.

Q. Of course, you understand, I am referring to after Mr. Kirkevold took it over, which the testimony shows was in March, 1942, and this policy was issued in August, [323] 1942.

A. Well, that is why I can't remember just when the changes occurred, but the previous people who ran that department had a desk out in the sales room right next to the stairs in the corner of the railing, and just when Mr. Kirkevold changed that desk, I don't know, but later he had no desk there. That is the only change.

Q. Do you remember, Mr. Orkney, whether after the issuance of the policy there was any partition built in here, along here—along the front edge of the mezzanine?

A. I have to get my bearings on that.

Q. This is the front of the mezzanine. These are the steps going up into the mezzanine floor, and this is the sales room and this the work room, and this has sometimes been referred to as the catwalk along here, and referring to that line marked w. and

(Testimony of James W. Orkney.)

p., do you recall any partition having been built in there after the policy was issued?

A. I couldn't—frankly, I didn't even remember there was a catwalk along here. I know this was open. This was railing.

Q. When you say "this," that refers to the front part of the sales room?

A. I know from here, to here (indicating) it was railing, from here to here.

The Court: Speak a little louder. [324]

The Witness: I say, I know from here to here was railing, but from here over to here, just when that changed if it did change from a railing to a wall, I couldn't say.

Q. Do you recall any change having been made after the issuance of the policy and before the fire, as to where fur coats were kept temporarily waiting to be worked on in the work room?

A. Well, prior to the time Mr. Kirkevold took over, I think they were along here (indicating). I wouldn't be positive, because originally——

Q. Frankly, we are only concerned with that one, if that was there.

A. Well, you are asking me if they were—where they were stored at the time the policy was issued.

Q. No, I am asking you where fur coats were kept temporarily while they were waiting to be worked on, at the time the policy was issued.

A. Well, I know there were—or it was the practice to have two or three or possibly more in this area where they work on them. I think they also have a table here (indicating).

(Testimony of James W. Orkney.)

Q. That is the part that is marked here "work room?"

A. I know there were from one to three girls or women working on coats, along here, and I know the coats they [325] were actually working on were here (indicating).

Q. When you say "here," you refer to the part marked "store room?"

A. This much, I am sure of here, because that is the part used by the previous operators.

Q. And to make the record clear——

A. As to whether they were kept here at the time time of the issuance of the policy, I can't say.

Q. To clarify your other answer, and to make the record clear, when you say "here," is that the part marked "opening" there?

A. That is marked——

Q. Is that the part you were referring to?

A. Well, I think this door is in the wrong place, or the opening—whatever it is, I think it was a drape there, as I recall it the opening was right here (indicating).

Q. That is, you would say it is a little closer to the foot of the balcony?

A. Yes, and the work room as I would classify it, was up to the edge of this door, there (indicating).

Q. Well, this part marked w. t. here, towards the front of the balcony, was not that being used for work room purposes?

(Testimony of James W. Orkney.)

A. There was a table there during some of that time. Now, I may sound very forgetful, but when you have got four different operators of a fur room that you are trying to [326] think back on, why, I can't be too sure. I know there used to be a work table right in there, or a table——

Q. Now, when you say, "right in there," are you referring to the "w. t." that is closest to the bottom of the map?

A. Uh-huh. Well, I suppose——

The Court: Well, there is really no dispute on those features of the case, as I understand it.

Q. Now, do you remember whether or not Mr. Kirkevold in 1942, used the part that is marked "store room" for keeping fur coats that were waiting to be worked on?

A. Well, you say in 1942?

Q. Yes. In other words, the policy was issued in August, 1942, and I am referring to along that time.

A. I couldn't testify whether he kept any coats back in there. I think—I wouldn't be positive, but I think Barnes-Woodin had some miscellaneous things stored in here, but as to—well, I am quite sure he didn't have any back in here. I am indefinite about it, though.

Q. You have stated a few minutes ago that you had no authority as agent to issue policies of this nature. Did you have any authority as agent to make any changes in any important respect in the policy of this nature that had already been issued, such as the policy limits, or anything of that kind, or——

(Testimony of James W. Orkney.)

Mr. Velikanje: I am going to object to that, [327] Your Honor. I don't see that it is material. I don't believe an agent would have a right to testify to his power of agency where he is testifying against a third party.

The Court: Oh, he may answer. I don't want to spend much time on that.

A. I didn't have any authority to make important changes. I can't change the terms or conditions of a policy. I have authority to bind up to a small limit.

Q. When you say "bind," that is just a temporary——

A. Immediate protection.

Q. Mr. Orkney, did you ever examine the receipts or the copies of the receipts that were kept by Kirkevold with reference to fur coats?

A. No, I possibly have seen one lying on the table, but I never examined them.

Q. That was not part of your duty or work, was it, to make an examination of those?

A. No, I would not say so.

Q. Did you ever have any knowledge of any kind, Mr. Orkney, prior to the fire, that any of these receipts had been issued by Kirkevold or his employees without showing on the receipts the valuation of the fur coats?

A. Did I have any knowledge?

Q. Did you have any knowledge of that having been done? [328]

A. That he issued them without showing——

Q. Without showing a valuation on the receipts.

(Testimony of James W. Orkney.)

A. No, I did not.

Q. You did not, and did you have any knowledge at any time prior to the fire that in some instances certificates were issued for one amount and receipts issued for the same fur coats for different amounts? A. No.

Q. You are not connected with the Home Insurance Company at the present time, are you, Mr. Orkney?

A. I still have possibly two outstanding policies.

Q. You have no personal interest in this matter one way or another, have you?

A. No, I am really between both sides here.

Mr. Hutcheson: That is all.

Cross Examination

By Mr. Velikanje:

Q. Mr. Orkney, as to the certificates, didn't Mr. Kirkevold discuss with you several times wanting to know why they had to be listed in his monthly report? A. That is right.

Q. And weren't you advised that he fixed a maximum on those of \$200 when the certificate might be over that, and that is what he reported? [329]

A. Well, I don't recall that.

Q. But, you were advised of the fact that his monthly report did not necessarily show the amount of the certificate that he had listed, isn't that true?

A. Well, I know that he always included the value of the certificates in the amount he reported to the company.

(Testimony of James W. Orkney.)

Q. He included the amount of the certificates?

A. In the total value he reported to the company, each month, that is.

Q. And paid a premium on that?

A. That is right. He often asked me why that was necessary.

Q. Then, he paid an additional premium for the issuance of the certificate, isn't that correct?

A. That is correct.

Q. In other words, he paid premiums twice on those certificate policies?

A. That is the way.

Q. You took it up with your company, did you not?

A. I asked them why it was necessary to include the value of the certificates in the total value for each month.

Q. And what was their answer?

A. I have had to do that for every furrier I have insured.

Q. Did they ever give you a satisfactory answer?

A. Not satisfactory to me. [330]

Q. Then, on those certificates, Mr. Kirkevold paid a premium when they were written?

A. He paid a premium on each certificate that was issued, based on the value of the certificate.

Q. Then, if that coat was in his possession at the time he made a monthly report, he paid you another premium on that coat?

A. That is right.

Q. Were those premiums the same?

(Testimony of James W. Orkney.)

A. Well, no, the value he reported at the end of each month is on a monthly rate, and that is set by the company, and the rate paid on the certificates is just a standard rate, so much for each hundred dollars as shown on the certificate.

Q. Did he also include on the reports, the coats that he had there for repair? A. Yes.

Q. You know that?

A. Well, the reason I am sure of that is because quite often I would have to come over to him and get those reports, and several times I have been there when he opened his book and took the total taken in for that month, less what he delivered to the customer. That is why I know he reported everything that he had.

Q. In other words, you helped him make some of his reports? [331]

A. Well, if you would call my watching him take the total down, yes.

Q. Did you see his receipts where he took some of those amounts off of?

A. No, he had everything listed in a book.

Q. In a book. He had discussed with you, however, his receipts that he issued to customers, had he not?

A. Well, I think so, in a general way. I can't say definitely what the discussion would be, but——

Q. You never advised him his receipts were not sufficient, or anything? A. No.

Q. How often were you at Mr. Kirkevold's shop?

(Testimony of James W. Orkney.)

A. Well, I would go up there fairly often until he started working on the farm. From then on, as I recall it, his brother, Earl, took over—or I think I was a little late. At any rate, I did not go up so often from then on.

Q. When you say you were up there often, once a week? A. Oh, no, once a month.

Q. Would it average once a month?

A. No, I would not say that often.

Q. During those visits up there, did you see fur coats stored in the back part of this room?

Mr. Hutcheson: That is calling for a conclusion.

Q. Did you see fur coats hanging on racks in the back of this room?

A. Well, I believe the last year, prior to the fire I saw some there.

Q. Did you ever advise him as to his coverage under his policy, whether it was a store room? Was that ever discussed with him?

A. No, it was not.

Q. Did you ever report to the company that he had put that room in there?

A. No, I did not.

Q. Where has this application been since Mr. Kirkevold signed it?

A. Well, this is the original application that was sent in to Seattle, my copy I don't have.

Q. Mr. Kirkevold didn't have a copy of it?

A. No, no. Well, ninety-nine times out of a hundred, or nine hundred and ninety-nine times out

(Testimony of James W. Orkney.)

of a thousand, I make a copy and keep it in our office, and attach it to the daily——

Q. But you don't have any——

A. The only copies of that would be on my daily, and one sent to the home office.

Q. Mr. Orkney, isn't it a fact that you made this up and just asked Meryl to sign it? [333]

A. That is right. Whether or not I did it in his presence or over in the office, I can't swear.

Q. You did not get this information necessarily by him, you just took it down by visiting the place.

A. Well, this information here, I would have—I already had that. I can't tell you whether I checked it over or,——

Q. In other words, you just told him, "here is your application. I will get you the fur policy and sign it."

A. Well, I couldn't testify to that. Naturally, I don't know whether I made it up in his presence or over in the office. I did have him sign it.

The Court: Well, if you made it at the office, did you have some data that you were following?

The Witness: Yes, you see I had another company's policy on this risk prior to this.

The Court: That you had written for someone in a previous occupancy of these premises?

The Witness: The way that came about, I had Mr. Kirkevold's insurance when he was in for himself, across the street, and in another building. As I recall it, I transferred that insurance over to Barnes-Woodin, and I believe the insurance that

(Testimony of James W. Orkney.)

was already in Barnes-Woodin was dropped. You see, I had both locations [334] at the same time, for the previous operator of this location.

Q. That is where you secured some of this information, from your previous records?

A. Well, I can't—

Q. That is, I say if it was made up in your office.

A. Well, it was made up in my office and it came from the previous policy—my previous application. Otherwise, it came—

The Court: Well, did you ever go up and look over these premises before you took the application—before you took the policy—before you delivered any policy.

A. I inspected his—well, I suppose what you would call his vault there. At least, that storage—

The Court: That is, before you took the application.

The Witness: Well, when it was originally put in there by the previous owner I went all through it with him, and told him what he had to do and what he did not have to do in order to get the insurance. That is Lee Jackson, who used to operate it, as I have been in this enclosure with Mr. Kirkevold, because I recall that he put gas in there, and had a fan in there, but as to whether or not it was done at that particular time I couldn't say.

The Court: That is where he had the summer storage on the second floor?

A. That is right.

(Testimony of James W. Orkney.)

The Court: But, when he had the garments hanging on racks in the mezzanine floor, did you ever check that with him?

A. I have gone into the location there any number of times.

The Court: Was that after this partition had been built up?

The Witness: Which partition is that?

The Court: The one that has been described here by various witnesses.

Mr. Velikanje: The testimony was that Mr. Kirkevold built this partition in here in 1943.

The Witness: Well, I can't say whether he did or did not.

Q. But, you were back in these premises after '43? A. Oh, yes.

The Court: Well, did you discuss with him then, any questions as to the company liability or his coverage?

The Witness: No, the only question as to the coverage was in this inclusion of certificates and the values at the end of each month.

The Court: That was the only discussion you [336] had with him?

The Witness: That is the only one I can recall.

Q. You never discussed with him what the word "storage" meant or "storage room?"

A. No, we never went into it.

The Court: Did this business of his increase—have a tendency to grow after he went in?

The Witness: Very rapidly. I don't know what

(Testimony of James W. Orkney.)

you would classify very rapidly, but to the extent that I had to change companies. You see, I had him in another company up till the time this policy was issued, and I had to make a change because I couldn't handle the capacity. They had other insurance in the store, but prior to that they could have.

The Court: Now, when the premiums were paid, they were paid on a monthly basis, depending upon the amount of merchandise he had on hand for his various customers, is that correct, though generally they were paid on a monthly basis?

The Witness: That is right.

The Court: The premiums fixed in the policy is a contingent premium, rather than a flat premium?

The Witness: That is right, the rate is steady, but the payment changes. [337]

The Court: Were they paid to you?

The Witness: They were paid to me.

The Court: Would he come over and pay them or would you mail him a bill, or how?

The Witness: Well, the company supplies a pad of forms, and on it it shows a blank for the total valuation, that rate so and so, and a place for the premium, and he figured that out and marks it down and signs it and he would attach his check, sometimes, and sometimes that would come in without it, but at any rate when that would arrive at our office we would put through a bill on his account

(Testimony of James W. Orkney.)

for that amount, and then send it on to the company.

The Court: I think that is all I have.

Q. Mr. Orkney, I hand you plaintiff's identification 14. Is that the form you had him fill?

A. That is right.

The Court: I do have another question. I want to ask in connection with those. What was your compensation out of this insurance contract?

The Witness: It is a commission.

The Court: Based upon each month's payment of premium?

The Witness: The commission is based upon the [338] amount paid in by Mr. Kirkevold.

The Court: Monthly?

The Witness: That is right.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: No objection.

The Court: It will be admitted.

(Whereupon, form referred to was received in evidence and marked plaintiff's Exhibit No. 14.)

The Witness: We put it on a monthly report to the company at the end of the month. We would pay them that amount, less our commission.

Q. Mr. Orkney, isn't it a fact that you were handling all of Meryl's insurance?

A. That is a fact, I believe I was, anyway.

Q. Didn't he rely on you to write the necessary insurance?

(Testimony of James W. Orkney.)

Mr. Hutcheson: Oh, that is objected to, if the Court please.

The Court: I think that probably calls for a conclusion of the witness.

Q. Mr. Orkney, in the writing of this policy, was there any difference of premium on the amount outside of the storage and the amount in storage rooms, as designated [339] here by hundred thousand and ten thousand?

A. There is only one rate specified on the policy.

Q. Now, if for example this amount outside of storage room had been twenty or thirty thousand, would there have been any different rate that would have been charged?

A. I don't believe so. I have increased those on various policies with no change of rate.

Q. And when this monthly report went in, where it said daily customers, is that where it was to have been filled in?

A. Well, he would fill in the amount here, the rate so and so, and he would show the premium, and then he would sign it and date it.

Q. But, that was a rate charged on all of the coats that were in his possession, irrespective of what they were, isn't that correct?

A. He paid that rate on everything in his possession, to the best of my knowledge. I don't know whether that answers your question or not.

Mr. Velikanje: I believe it does.

The Court: Is that all, now?

(Testimony of James W. Orkney.)

Mr. Velikanje: No, I have a couple more questions.

Q. Did Mr. Sinclair ever discuss with you at the time he was [340] negotiating on this matter the question of storage or the ten thousand dollar feature? I am not speaking of Mr. McKinley, I am speaking of Mr. Sinclair.

Mr. Hutcheson: That is objected to. I don't think that would prove anything, the conversation between the agents of the company.

The Court: I think I will sustain the objection. Now, it seems to me the only purpose it could be to impeach him, and he has not laid any foundation.

Q. Did you ever discuss the ten thousand dollar feature between Mr. Sinclair and Mr. Kirkevold when the three of you were there?

A. I don't recall any time that the three of us were together.

Q. Did Mr. Kirkevold ever come to you and ask you to date back on his policy or increase it back?

A. Oh, no, I think I know what you are referring to. I listened to the testimony this morning. Mr. Kirkevold after he found out that the ten thousand was the limit Mr. Sinclair said he was entitled to, called me and asked me if I could influence the company to pay him above that, and I said I would certainly do my best, and I called the Seattle office and I supposed the term "put the pressure on" is the right term, to the extent that the manager of the Seattle office and the special agent who called on me [341] from time to time,

(Testimony of James W. Orkney.)

both came over in regard to this loss. I believe they talked to Mr. Sinclair.

Q. Well, Mr. Kirkevold wanted to know if he—if that room upstairs didn't come under the hundred thousand, wasn't that what he wanted to know?

A. I don't recall his asking me that. He never at any time tried to get me to do anything wrong with the policy.

Mr. Velikanje: That is all.

Redirect Examination

By Mr. Hutcheson:

Q. Mr. Orkney, have you ever known of a policy of this nature that was issued by this or any company in the amount of the coverage in storage vaults and safes, wasn't very greatly more than the amount of coverage outside of the storage room vault and safe? In other words, isn't it the custom and practice in this kind of science to have the coverage in such places much more than the coverage outside?

A. Yes, all of those I have read, and I am not familiar with what other people have written, but the coverage of inside storage is much greater than outside.

Q. Do you have any personal knowledge, Mr. Orkney, as to whether these monthly reports were, in cases where certificates were issued, whether in arriving at the total, [342] was that based on the amount of the certificates or the value on the release—I mean, I don't mean value on release. I mean

(Testimony of James W. Orkney.)

value on the receipts. Do you have personal knowledge of that?

A. Well, the only thing I know is that this book, at least from what I knew, this book that he had listed, I wouldn't know whether it was a certificate or the receipts that he listed—showed a value for each coat that he had in his possession, and that was totaled and that was the amount used each month. If that total was anywhere near the hundred thousand limit, or—I am referring to that coverage there, then he would raise that amount, and that has been the practice before and since.

The Court: You mean, he would raise his coverage by getting a rider put on his policy?

The Witness: I believe, if you inspect that policy, you will see that it has been raised.

Mr. Hutcheson: Yes, it has been raised subsequently.

The Witness: That monthly report came near that limit, then that limit was raised.

Q. Prior to the fire, the monthly reports never were as much as a hundred thousand dollars, were they? [343]

A. Prior to the fire?

Q. Yes.

A. Well, I am not positive.

The Court: I think they were, Mr. Hutcheson. The rider here, so you may have this, December 28, 1943, taking September and October, \$116,000. Now, that may be too much.

The Witness: Well—

(Testimony of James W. Orkney.)

Q. \$116,000, is that a total for the two months, Mr. Orkney?

A. That is the total for the two months, I believe,
The Court: Yes.

The Witness: I believe the previous policy to that would show the increases, because he did increase from time to time.

Q. The monthly report that was sent in, merely had the total, it did not give the items, is that correct?
A. That is correct.

Q. Now, the expression was used a few minutes ago that Mr. Kirkevold paid an additional premium for the certificates. As a matter of fact, that additional premium where a certificate was issued was paid by the customer to Kirkevold, and then he in turn paid that to you, is that correct?

A. Well, he paid it to me. I presume he charges the [344] customer.

Q. That is your understanding. In other words, the cost of the certificate did not come out of his pocket, did it?

A. Well, I couldn't say to that. The furriers often include storage and insurance in one lump sum. Now, if I was a furrier I would collect, but——

Q. Well, were any of these certificates issued to a customer who did not pay an additional premium for them?
A. I don't know.

Q. The issuance of the certificate was just outside of your work, is that right?

A. We left the book of certificates with him.

(Testimony of James W. Orkney.)

Q. Yes.

A. And whenever he issued a certificate he would send us the various copies of that certificate.

Q. The certificate, insofar as they were issued, were issued by him or his employees, and not at your office, is that correct?

A. That is right.

Q. The advantage of the certificate for the customers, is that it covers, regardless of the location of the coat, is that right?

A. The certificates, as far as I can interpret it, covers practically all risk, anywhere, with no exclusion, except while actually worked upon by a furrier. [345]

Q. The certificate premium to the customer was at a somewhat reduced rate, cheaper than it would have been if he had taken out an independent policy?

A. Well, even that is variable. It is in some companies and in some companies not.

Q. In this instance, it was cheaper, wasn't it?

A. I think possibly it was, but I would not say without checking the rate book.

Q. Mr. Kirkevold, for a matter of at least several months before the fire, was out at his farm, wasn't he, as far as you understood, most of the time?

A. I think he was.

Q. And during that period, after he started farming and during a period of several months before the fire, you did not have occasion to go to the Barnes-Woodin Company, did you?

(Testimony of James W. Orkney.)

A. I don't just recall when his brother came in and took over but——

Q. Well——

A. The only occasion I would have to go there would be the lady who testified this morning, I believe who had charge of the sales—I am not too positive at that time, but——

Q. The testimony is undisputed that his brother entered the army December 1st, 1943.

A. His brother entered the army. [346]

Q. Entered the army, yes, so from that time, after his brother left until the fire in May, 1944, were you in the fur department at all?

A. Well, I saw his brother over there quite often.

Q. I say, after his brother left the previous December, before the fire.

A. I would go over. The woman or lady who took over during the day, or tried to take over as much of Meryl's work as possible——

Q. Mrs. Hawkes, is that?

Mr. Velikanje: No, Mrs. Stevens.

The Witness: Well, I don't know which is which.

Mr. Velikanje: She is the woman that testified this morning.

The Witness: Yes, I would see her. It seemed to be two more or less in charge, one seemed to do the repair work and Mrs. Stevens did the sales work, and she was the one I would contact.

(Testimony of James W. Orkney.)

Q. Were you there very often during that period?

A. I can't say. I know it was several times, is all I can say.

Q. Did you ever have—of course, I realize you are not a furrier, Mr. Orkney. Did you ever have any knowledge that the value of the fur coats on the mezzanine floor, [347] of the customers fur coats on the mezzanine floor, was more than ten thousand dollars?

A. Did I ever have any idea?

Q. Yes, any knowledge that the total value of the fur coats of customers on the mezzanine floor before the fire was more than ten thousand dollars?

A. No, I did not. The matter of fact is, I didn't know what the value was there.

Q. Did you have a policy—a customer's fur coat policy covering Kirkevold during the period from August—or from March, '42 to August '42? The testimony is he moved into this location in March '42.

A. Well, as soon as he moved I had his insurance there.

Q. And until August you were the agent, but it was in another company, is that right?

A. It was at the time this policy was written. It was in another company.

Q. So, you did have information in your file that Mr. Kirkevold had given you previously with reference to his place of business when you wrote this application in August, 1942, is that correct?

(Testimony of James W. Orkney.)

A. I must have had.

Q. Yes. You as agent for other companies that you represented, you were still writing insurance for [348] Mr. Kirkevold in the Barnes-Woodin Fur Department weren't you?

A. When is that?

Q. Right up to the present time. A. Yes.

Q. In other words, the policy of this nature that they have now, you wrote for him in another insurance company that you represent?

A. Effective May, '45, I think.

Q. Yes.

A. I placed it in another company.

Q. And it is still in effect? A. Yes.

Q. Is that right? A. Yes.

Mr. Hutcheson: That is all.

Mr. Velikanje: That is all.

Mr. Hutcheson: We rest.

The Court: I think we will take a short intermission now.

(Recess.) [349]

MERYL KIRKEVOLD

resumed the stand for further examination and testified in rebuttal as follows:

Direct Examination

By Mr. Velikanje:

Q. Mr. Kirkevold, in your discussions with Mr. Sinclair did you ever discuss with him the limitations of this ten thousand dollars? A. No.

(Testimony of Meryl Kirkevold.)

Q. Did he ever advise you you were limited to ten thousand dollars on the policy? A. No.

Q. He never advised you of that fact?

A. No.

Q. When were you first advised of that fact?

A. I think at the time that the Home Insurance Company gave us—or wanted us to sign half the releases for the five thousand. I think that is what it was.

Q. Well, wasn't it when Mr. McKinley came into the picture? A. Yes.

Q. Mr. Sinclair never advised you of that fact?

A. No.

Q. Did you ever ask Mr. Sinclair to redate the policy or rewrite it in any way? [350]

A. No sir.

The Court: I don't think there is any issue.

Mr. Hutcheson: No, we did not contend that.

Q. While you were working on your ranch, were you still in charge of your fur department?

A. Oh, I had a lady in charge to supervise it.

Q. And were you living in town at the time?

A. Yes.

Q. Would you work nights? A. Yes.

Q. How about Saturdays and Sundays and so forth?

A. We had Saturday afternoons off.

Q. Were you in the store during those times?

A. Saturday afternoons I usually came in.

The Court: I wanted to ask you a question. When a customer brought in a fur coat for cleaning

(Testimony of Meryl Kirkevold.)

and repairs and alterations and so forth, did it go through the same process, insofar as time was concerned, from the time it came into your hands and was delivered back to the customer, to remodel or refinish or the cleaned product?

The Witness: Yes, it did.

The Court: And when you had cleaned it or repaired it, or whatever you did with it, then where would you put it? [351]

The Witness: You mean, was it a finished garment then?

The Court: Where would you put it?

The Witness: Well, it would be——

The Court: Until the customer came and received it, I am trying to get clear in my mind the distinction if there was one, between the coats you took for summer storage or a longer period of time, and the coats you took for repairs and alterations?

The Witness: Well——

The Court: Would you take it up on this second floor?

The Witness: No, that would hang on the mezzanine.

The Court: Well, where?

The Witness: In the storage room, in the back.

The Court: That is what I wanted to get cleared up.

Mr. Velikanje: That is all. We rest, your Honor.

(Witness excused.) [352]

Mr. Hutcheson: We make a motion for default to the third party defendant Dorothy Riggs.

The Court: Your motion will be granted.

Mr. Hutcheson: We rest.

The Court: I want to shorten this argument as much as possible, and not have counsel spending a lot of time on matters that are already fairly clear in the Court's mind, and for that reason probably I might make some suggestions that may be helpful to you.

I appreciate the issues as made here. The major issue of course is the first one that was set forth in the order made by this Court in a pre-trial hearing. That was the question of liability of the defendant Home Insurance Company under the terms and conditions of the insurance policy being a question of liability under the ten thousand dollars or the hundred thousand dollar protection to be determined by the evidence and facts.

The second, as to the liability of the defendant Home Insurance Company based upon the individual floater policies—that is, as to whether said policies are under policy limitations, and if there are such limitations whether they are in addition thereto. [353]

Third, actual amount of loss dependent upon the value of the coats destroyed, parties to be limited in proof of valuations by not to exceed three expert witnesses. That is not material here now.

Liability of third party defendant Dorothy Riggs, and her claim. That has been disposed of by the oral motion that the Court has just granted.

The question as to whether or not interest should run on any amount of recovery, and this last one is more nearly a matter of law than it is one of fact. I shall have no difficulty with that question, I think, and the question covered by 2, liability of the defendant Home Insurance Company based upon the individual floater policies—or in this case they have been referred to as certificates. My mind is fairly well made on that issue, and there is no serious dispute about the amount of loss dependent upon the value of the coats. I am of the opinion that the plaintiff, if it is entitled to recover on the other issues raised here, is not entitled to recover a profit to be made in substituting a new garment for a used garment, but his loss would be measured by what this garment cost him in the matter of replacing it, rather than what the profit would have been if he had made a sale on the open market, and [354] the other items of loss are not—there is not a serious dispute. It seems to me that without attempting to analyze the ten or twelve that are here involved, I think where there was no value placed upon the receipts, and as to what the value was, the testimony is not sufficiently in dispute here to raise an issue in the mind of the Court that it would be other than that that was fixed by the plaintiff himself as he went through those seven or eight items. I think it runs somewhere from a hundred and fifty to two hundred dollars, excepting where they had these so-called certificates out, and my finding would be in that sum as to them, but I do want to hear from you, Mr. Hutcheson, on this first issue

because, unless there is law from cases that are quite on all fours with the case here—and I don't mean to ask you to go into the many, many insurance cases we have, because they are legend, my disposition is to hold that the definition of the term "storage" is one that must be given a liberal construction in favor of the plaintiff, under the general rule of law that an insurance policy must be liberally construed in reference to the one who buys the protection, and is strictly construed against the insurance company who writes the policy. I will hear from you first, Mr. Hutcheson, and based upon [355] that—and I have given you these suggestions so that you can confine your argument rather than ramble all over on matters that I might have already disposed of in my own mind.

(Whereupon, argument by respective counsel.)

The Court: Mr. Hutcheson, the Court has allowed quite over an hour in your total argument, and I just do not feel that to go farther would be of any great assistance. I think I am prepared to make a disposition of this case by omitting certain minor features of it.

I am satisfied that the case would never have been brought into this Court, or any other Court if liability had been admitted by the insurance company on the hundred thousand dollar phase of the policy. The parties would have gotten together on all of these minor details, and the case therefore turns in large measure upon that feature of the policy. From what the Court has said, it is

evident to all parties, I am sure by now, I shall and do determine that this hundred thousand dollar provision of the policy was one that covered the various fur articles in the room on the mezzanine floor that has been at times [356] referred to as the storage room by the plaintiff, and at times referred to as the work shop by the defendant. I think that I should, for the benefit of an Appellate Court if it is seen fit to take this case to an Appellate Court, state briefly my reasons. In so doing, I must refer to the cases cited by the defendant in an able manner which show an exhaustive research and unusual industry. Many of them are not at all in point in defining the term "storage rooms" as found in this contract of insurance, because they deal with the enforcement of criminal laws and ordinances. The construction placed upon words and phrases and sentences in a criminal statute, is an entirely different construction from that, which would be placed upon a policy of insurance, and particularly a policy of insurance such as we have here, and more particularly upon this policy by reason of its background and history.

The representations, whatever they were, whether direct or otherwise, by Mr. Orkney are binding upon the defendant company here, and I take that position in making a disposition of this case. There is one feature of it that makes it comparatively simple for the Court to dispose of, which is that there is no remote claim or suggestion that there was anything [357] dishonest, fraudulent, deceitful, or any misrepresentations of any kind made by the

plaintiff in securing the insurance, and the Court, after observing the plaintiff upon the witness stand and hearing his testimony, and noting the answers that he made both on direct and cross examination, is convinced that he is a man of high character and good reputation.

The contention, made for the first time here, that there was only a limited liability on this policy after the loss had occurred, coming from the two witnesses who represented the insurance company as adjusters, indicates that both acted in good faith, but after all presented only their opinions, and can not be binding upon the Court. In fact, the record would seem to indicate that the first of these adjusters did not even raise the issue as to limited liability, though there might be some inferences from his testimony that he intended to, but at any rate when the second adjuster—I think it is Mr. McKinley, took the stand and testified, he, through his own initiative raised, for the first time, this question of limited liability.

The evidence in the case clearly establishes that plaintiff had a thriving and growing business from the time of the issuance of this policy, which was a policy without time limits, but had provisions for its cancellation. The business not only grew rapidly, but the proprietors found themselves in a position where they could not care for the increased volume of business with that degree of expedition that they could before the war time, and merchandise that came into them in the way of fur coats and furs, were much longer in being processed.

Nevertheless, they assumed, and in good faith, liability to the general public in an invitation, or in many invitations, they extended by pamphlet and by newspaper advertisements and other means, to assure the prospective customers that if their fur garments were brought to them, they were covered and protected by insurance from the time they reached their hands until they were delivered back to the owners. That would not necessarily change the contents or the construction to be placed upon this contract of insurance, but it does establish to a very high degree the good faith of the plaintiffs and what were their honest beliefs.

The testimony of Mr. Orkney, the agent for the defendant, indicates to this Court very clearly that it was his conviction, even with all the familiarity that he had with the surrounding situation and conditions, that he had written and delivered, or caused to be written and delivered a policy that covered all of the various garments that were brought in here for servicing.

Now then, let me take just a few moments to consider this contract. We must always bear in mind that the contract must be liberally construed in favor of the insured, and where there is any ambiguity or any uncertainty, that must be resolved against the insurance company and in favor of the insured, because this is their own contract, written by them. It is very clear that the assured, whether through carelessness or otherwise, did not read the contract of insurance. Neither did the agent that delivered it to him. I think the record

will bear me out he said he did not even read it himself, and the application made for it, I have no hesitancy in finding it was made in the absence of the insured, based upon some previous data, which the agent had.

This policy, in giving it that liberal construction which we must, in favor of the effectiveness, to accomplish the purpose for which it was written, particularly where all parties acted in good faith, certainly covers every article that is involved in this suit. After I determined that the room where these furs were deposited in the course of processing was a storage room, it would cover these furs as well [360] as those in the vault, because this policy covers—now, I shall read its provisions, touching this phase of the case: “while in storage rooms, vaults or spaces at locations hereinafter described.” I am leaving out that provision that deals with transportation or otherwise, and I am giving the insured the benefit of the semicolon placed in this small print.

For more than two years, the agents of the company accepted the premiums and they were growing in an ever increasing amount, month by month. The business, as I have said, had reached such proportions that it became necessary after the customer left her fur coat with the plaintiff, that the plaintiff make some provision to safeguard and protect that coat, and he provided it by building a partition, moving out whatever furniture there was in the space that he referred to as a storage room, a place where these garments could be kept,

and it was for a period of a month or six weeks before such garments could be processed and he assumed all responsibility for them. In this, there was nothing but fur garments, as I interpret this testimony, coats and capes and whatever there was, and they were waiting processing to be taken to another storage room, but certainly under the provisions of this policy, under the situation that prevailed in [361] this particular case, the room on the mezzanine floor where these things were placed was a storage room, and liability to this defendant grew out of that fact. Knowledge of the defendant's local agent must be attributed to the defendant. I therefore find that the plaintiff is entitled to recover in such sum as is measured by the amount of the loss sustained on those garments that were within the mezzanine storage room or lower enclosure. The evidence is rather uncertain as to what percentage of them were in there. The plaintiff testified, I think, that he had some twenty to twenty-five per cent of the garments out in the work room. That is about all the evidence that I have in that regard. I think I shall find that his loss on a ratio basis is twenty-five per cent, to be calculated against the ten thousand dollars contract provision of the policy, and seventy-five per cent against the higher coverage of the hundred thousand dollar provision.

I have indicated that to allow plaintiff a recovery in those instances where he delivered a new garment of a value equal to that claimed by the owner of the garment lost, would be to allow him

to profit in such transactions. I further considered the matter and I am inclined to believe that I am bound to accept what constituted the market value at the time, and [362] the only evidence I have in that regard is that of the plaintiff, and I shall accept that, rather than his wholesale cost price on those articles, and in calculating the recovery to be made, it will be made on that basis.

Now, on the issue of interest, I was under the impression that interest should be charged either from the date of completion of filing of the proof of loss, or at the time within which to bring the suit, but there were, and will, it seems to me, of necessity, be numerous instances here that could not be determined until today. For that reason, I am not going to allow interest from a date other than the one when this judgment is entered, and if I have omitted in my oral statement here disposing of this matter, anything that counsel feels should be considered in order to expedite the drawing or preparing of your findings and conclusions and decree, I wish you would mention it.

Mr. Velikanje: Your Honor, there is one thing on these certificates. Are you allowing the amount of the certificate or the amount of the receipt? You see, these certificates, the certificate holders had made proof of loss on their certificates, though the amount listed in the proof of loss and Mr. Kirkevold might not have been as high, but they had made proof of loss on their certificates.

The Court: Mr. Kirkevold has taken an assignment of all of them?

Mr. Velikanje: That is correct.

The Court: And paid the amount of the certificate?

Mr. Velikanje: That is correct.

The Court: Do you agree with that?

Mr. Hutcheson: He replaced the coats, but I submit the plaintiff could not recover more than the amount stated on his proof of loss.

The Court: I am rather inclined to think your position is sound in that regard, Mr. Hutcheson.

Mr. Velikanje: The only thing is this, your Honor; if I might take a minute to remark on that, Mr. Orkney testified that the amounts they paid their premium on was the amount of the certificate value. Let's take this example, one coat I believe of Mrs. Palmer's or Mrs. Stanley, was shown in the proof of loss filed with the insurance company at two hundred dollars. Mrs. Stanley made a proof of loss to the insurance company which they admit she did make, of eight hundred dollars, and Mr. Kirkevold paid her eight hundred dollars cash which he testified was the reasonable value of that coat and he had also paid an [364] additional premium on that certificate, and then has taken an assignment of her eight hundred dollar claim.

The Court: I do not know whether your complaint covered that situation or not, I have no independent recollection now without going back to it. Generally speaking, you would be entitled to recover only the sum you made proof of loss on. Now, does somebody else have a claim against the insurance company growing out of this loss, who

assigned their claim to you, and you sue as an assignee on such claim, and prove it, then of course you would be entitled.

Mr. Velikanje: That is what has been done in this case.

The Court: It is in your complaint?

Mr. Velikanje: That is correct.

Mr. Hutcheson: I can't give the Court——

The Court: If it is, then you will recover. If it is not, you will be bound by your proof of loss.

Mr. Velikanje: I was going to refer—it says, paragraph VIII: “in addition to the amounts set forth in plaintiff’s proof of loss, several of said customers’ garments and furs were covered by certificate endorsements, being special certificate policies, covering an amount beyond that as listed under assured’s legal liability. That said customers [365] have paid an additional premium for said coverage and had filed with said company due proof of loss. That under a letter dated October 4, 1944, the law firm of Cheney & Hutcheson returned to said customers and policy holders their proof of loss with the notation that settlement would be completed with them. That the persons holding such certificates of endorsements and the amounts of loss suffered by them and shown by proof of loss under said certificate or as follows, and they admit in their proof of loss they filed under those certificates.”

The Court: I assume that was denied by a general denial. I think they are entitled to recover. Are there any other——

Mr. Velikanje: I did not get your Honor's ruling there.

The Court: I think these claims of certificate holders will be allowed under all allegations made in the complaint, and the denial of it because the proof is clear that they were certificate holders; that they paid an additional premium and the testimony is that the master policy, if we may call it that, constituted the assured, the agent of the insurance company to write these certificates.

Mr. Hutcheson: Your Honor is holding that the plaintiff can recover the larger amount on that?

The Court: On those claims where they were based on certificates, yes, and which had to be assigned to plaintiff.

Mr. Hutcheson: There is another very important question that I do not believe the Court has touched on, and that is, it is our position that as to any particular coat, they can not recover more than the valuation stated in the receipt, and that is our position, they would be limited to that in all cases, and that in cases where they wrongfully failed to write——

The Court: I think you are correct in that, excepting where there were special certificates that the company wrote special insurance and took the premiums on, then there is no proof here that it was not worth the amount that is set forth in those policies.

Mr. Velikanje: I think what he was referring to, your Honor, was some of these—there were

about four, I believe, that had no receipt amount listed.

Mr. Hutcheson: I am referring to that, and I am referring to every single one of the thirteen where there was certificates. The question runs all the way through there.

The Court: Well, the plaintiff testified [367] as to those, as well as to all of them, didn't he, as to what the value was?

Mr. Velikanje: That is correct.

Mr. Hutcheson: It is not a question of value. It is a question of policy limitation that it can not exceed the value stated in the receipt.

The Court: I shall have to hold against you on that.

Mr. Hutcheson: On what ground, your Honor?

The Court: I take the broad position now that this policy insured against loss, and when the assured makes their proof—in compliance with the provisions of the policy, and second, after litigation is instituted and the plaintiff has proven here——

Mr. Hutcheson: Your Honor, the point that I am referring to was settled by the pre-trial order “that no claim will be higher than the valuation set forth on the receipt issued to coat owners, except in the case of those coats upon which there was a separate policy with the company.”

Mr. Velikanje: We are making no claim for anything beyond, but the only question that comes up is on those where no amount was listed on the receipt, but wherever an amount was listed on the

receipt, that amount has been put in our proof of loss—that amount [368] or lower.

The Court: Then do I understand there are no items where there was no value whatever placed upon it that are included in this litigation?

Mr. Velikanje: Oh, yes, there are.

Mr. Hutcheson: There are.

The Court: That is the point you are raising? Do I understand you are raising a claim on those?

Mr. Velikanje: Let us say we have taken a receipt and put a valuation of two hundred dollars or one hundred and fifty dollars on that coat. We have not claimed and do not claim anything beyond that amount which is listed on the receipt, but on the receipt where we had no value listed, then we are standing upon what the reasonable value was, or what the amount of settlement was.

The Court: But, that was testified to at the opening of the trial.

Mr. Velikanje: That was correct.

Mr. Hutcheson: Well, counsel's concession there covers all the cases, then? In other words, he agrees where there was no certificate, they can not recover more than the value stated on the receipt, so that as to those, that answers the point that I raised, but it leaves the question of the amount of [369] recovery in the cases where the plaintiff himself failed to state any value on the receipt, and I see no basis for recovery by the plaintiff at all there. In other words, if it were an innocent——

The Court: In those instances, didn't the proof of loss fix an amount?

Mr. Velikanje: That is right.

The Court: Then, was there not testimony here that the value of the article lost in the fire was of a certain amount?

Mr. Hutcheson: Yes, but they have not complied with the policy provision requiring a valuation as to each receipt in order to recover as to that garment.

The Court: I am rather inclined not to hold with you, Mr. Hutcheson, on that. I am not in the slightest prejudiced against the insurance company, but it does come with poor grace for an insurance company to draft a policy of insurance, collect the premiums, and then seek a way out by strained construction when a loss occurs, and I am afraid that is the position that you take now with reference to these particular items. They were lost. The loss is not denied by the adjuster who later came along. The liability was only denied, and based upon the fact the [370] adjuster interpreted the provision of the contract as being one limited so far as articles stored on the mezzanine floor was concerned, was the ten thousand dollar limit.

Mr. Hutcheson: We have also denied liability on both grounds.

The Court: I shall have to hold you are liable, and if I have now disposed of all those things that need to be cared for by the Court in order that you might prepare your findings—why I will leave you to submit them and I am wondering if when you agree upon them—and I hope you can, if you can submit them to me in Tacoma. If you can—

not agree, of course I will just have to arrange to come back to Yakima some time. My calendar has become badly congested by reason of my absence.

Mr. Hutcheson: For my information, will Your Honor come back later this month?

The Court: No, I have no arrangements with Judge Black to come back. My designation from the Circuit Court expires on Monday.

Mr. Velikanje: I presume if need be, we could come over and see you there.

The Court: I would be very glad——

Mr. Velikanje: I think that will be the [371] arrangement if we can't agree.

The Court: Well, is there anything further to present to the Court before adjournment? .

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,

Official Court Reporter.

[Endorsed]: Filed May 2, 1946. [372]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS ON MOTION FOR NEW TRIAL

Be It Remembered that on the 9th day of April, 1946, at the hour of 10:00 o'clock a.m., the above-entitled and numbered cause came on for hearing of motion for a new trial before the Honorable Charles H. Leavy, one of the judges of the above-entitled court, sitting in the United States District Court in the city of Tacoma, State of Washington; the plaintiff appearing in person and by his attorneys of record, Velikanje & Velikanje by E. F. Velikanje of counsel, and defendant appearing by its attorneys of record, Cheney, Hutcheson & Gavin, by Elwood Hutcheson of counsel; the following being a transcript of excerpts of said proceedings: [373]

2:00 o'clock p.m.

The Court: Now, you may proceed, Mr. Velikanje.

Mr. Velikanje: Your Honor please, I will try to hit the different items Mr. Hutcheson has, so if I do happen to miss any and the Court wishes any additional information on them, I wish the Court would call my attention to it.

First, as to the Belaire coat, and the Logozzo coat, our records were all destroyed in the fire, and naturally we have to rely on the information that is furnished us by the insurance company, and from that information we are willing that the Belaire coat be reduced to three hundred and twenty-five

dollars and the Logozzo coat to three hundred and fifty, or an overall reduction of a hundred and seventy-five dollars.

The Court: Are those the figures that Mr. Hutcheson mentioned?

Mr. Velikanje: They are, with this statement as to the Belaire coat. He states the Belaires did not file a proof of loss. However, I believe that is immaterial in this, that the insurance company was furnished with the certificates or copies of the certificates, and knew the amount of the claim of Belaire, and her amount was listed—at least, her name was listed in the [374] proof of loss as filed. It is true that amount was listed as only two hundred dollars, as Mr. Kirkevold's statement was the amount they put on all of these coats, when they were over that. In other words, they listed on their showing to the company each month, at two hundred dollars.

The Court: What was her certificate?

Mr. Velikanje: Three hundred and twenty-five dollars, and the Logozzo, we are advised, three hundred and fifty dollars. In other words, our overall amount is reduced then a hundred and seventy-five dollars.

(Argument continued by Mr. Velikanje.)

The Court: Well, you can very easily ascertain in a general way what his net profit was, in his business.

Mr. Velikanje: I believe that can be done.

The Court: The point is I have in mind—and

while I agree with you that the pre-trial order defining what the issues were was more limited than what the issues seemed to be after the Court had heard the evidence here, I agree with you in that regard, but we must bear in mind here that first we have a novel type of insurance.

Mr. Velikanje: That is correct.

The Court: It is one that we rarely encounter [375] in litigation. The contract of insurance contemplated that the dealer would be protected from loss within certain limitations.

Mr. Velikanje: That is correct.

The Court: But certainly never contemplated that he would reap a profit by reason of the occurrence of the contingency—that is, the fire, and then this same contract of insurance made the dealer the agent of the insurer insofar as he dealt with his customers in many instances by permitting him to write a type of insurance contract with the customer over and above the maximum liability per article, and that confuses or makes a confusing situation when we come to apply the precedence and the insurance laws in the situation we have at hand, but I was struck with—and still am, with the thought if the plaintiff Kirkevold is allowed the margin, whatever it may be on these replacements, then he has actually profited more than covering his loss. It may be, that there ought to be a distinction made between his gross profit in a transaction and his net profits, but it is inequitable to me and unjust, to tax the insurer

with a sum that is measured by a profit made to the insured, when the contract of insurance fixes as one item of, or one way of measuring what compensation should be, the replacement value, and I do not [376] think that it is assuming too much to say that when a concern as large as this insurance company couldn't have, if they had seen fit to have done so, and assumed liability for the larger sum in the policy that the Court has determined there is liability, go out and have bought at wholesale, articles that would have been in the nature of a replacement, at least in some instances.

Summing up, I cannot escape the conclusion that now to allow the full retail price that the plaintiff charged his customers as the measure of loss that the plaintiff sustained, is unjust, and not in keeping with the contract of insurance.

Mr. Velikanje: Your Honor, might I state on that it is true—I don't know, as I say I don't have the figures to know whether he has profited by this transaction or not, but let us assume that he has made a little bit by this transaction. Look at the amount he stood to lose, due to the action of the insurance company, as that exception is shown in *Corpus Juris*. They have the opportunity in this policy to go out and make settlements with the customers themselves, if they so desire. They can settle with the customers, or they can settle with Mr. Kirkevold.

The Court: Well, that is true. If we take your general statement, they had a right to contest the

[377] issue, which is not an open and shut issue at all.

Mr. Velikanje: That is right.

The Court: As to whether liability was fixed by the larger amount named in the policy or by the lesser amount, and in order to contest that issue, the delay in this adjustment came about, and they should not be penalized for that.

I am of the opinion, Mr. Velikanje, that we should, if you cannot, after a conference, stipulate as to what the net profits were in the transaction, and I can see the difficulty in getting that to an exact amount, but if you cannot do that through stipulation and agreement, perhaps I shall have to reopen the case on that issue to ascertain what that was so as to make a finding. I feel that I not only would be deciding the case on a wrong premise and misinterpretation of this contract if I render a decision that permits an actual profit by reason of the fire, on the particular items involved, and I think I would place the case in the position where it might well be reversed on that particular ground, even though the pre-trial order seems to limit it otherwise. The pre-trial order is incorporated with the whole of the case and is to be given consideration now in this motion for a new trial. That is not conclusive, because it is not an appealable order.

Mr. Velikanje: I am wondering if I might have ten days in which to submit some authorities on this other—this other theory of the case set forth in

Corpus Juris here, that where they have not set that up, and as to a determination of what cost is, whether it is cost to your wholesaler or whether it is cost to your costumer.

The Court: Well, I am willing to allow you ten days, but I do not want a lot of authorities submitted that go outside of these peculiar issues that are here involved, and this is, as I said a moment ago, a contract of insurance quite different from that that you find in the general insurance law where the assured is dealing directly with the insured, but this involves third parties.

Mr. Velikanje: That is right.

The Court: I am just doubtful if you will find any authority on a policy that construes a policy of this type.

Mr. Velikanje: I have not to date found anything that comes near it. I have looked and found other things, but as I say I would like a few days to run this down, finally, and make a determination of it.

The Court: On the other grounds, Mr. Hutcheson, that you raise, I shall have to deny the motion for a new trial. That is, the ground of—that was thoroughly [379] threshed out, as to whether or not the place where these articles were, was a storage room within the terms and conditions of this policy. I am still of the opinion that applying the liberal rule of construction to an insurance contract, and viewed in the light of the particular facts and circumstances disclosed in this case, where

the representative of this insurance company—I think his name was Arney——

Mr. Hutcheson: Orkney.

The Court: ——was at all times familiar and knew the circumstances, and I can only draw a logical inference, so it seems to me that he was fully familiar and certainly Kirkevold, the plaintiff, believed that he had his liability covered to the limitations that were fixed in the policy under the hundred thousand dollar provision as to all garments, except those in his work shop that were undergoing renovation and repairs and so forth, and as to the error claimed by reason of the admission of certain evidence, mostly documentary I think, I shall have to deny the motion, because I feel that they were in a degree, at least relevant, showing—tending to show the understanding of all of the parties to this contract of insurance in reference to liability, and certainly inviting the general public to come and deal at this place with the assurance that if the calamity [380] of fire occurred, they would not suffer any loss beyond a certain amount, and I think that takes care of the issues that you have generally raised.

I dislike to have to reopen this case for hearing on the matter of what the net loss was to the plaintiff in these replacements, and I think if I did I would be forced to the position from what has been said, of ascertaining what his net profit was at that time in his fur business—the difference between what he paid wholesale for the article and then

when he went through all of the various steps, until it reached the customer. Of course, he could not fairly and justly be made to measure his profits, because his profits are naturally somewhere between the sum that lies between the gross and the cost of doing business, and the thought lying back of all insurance, up to the limitations fixed by the contract of insurance, are that neither party should profit at the expense of the other, and certainly in this peculiar policy is that principle outstanding.

Now, if you could agree after a conference on what that sum—that net sum of profit was in these replacements, it would not necessitate a reopening of this case, and neither would it in any way prejudice your rights on appeal.

Mr. Hutcheson: I think we should attempt to [381] see whether we could agree on that fact.

The Court: And of course, if you cannot agree I will have to just let the matter go along until some time when I can get over there, or you could come over here, but I could see how if you do not agree, you might make a rather extended hearing out of the matter, but the plaintiff in this case seemed to be a man both fair and reasonable, and would doubtless make such disclosures that were necessary so you could ascertain about what he was making. I am satisfied had he handled these replacements as he did the others, by paying the amounts of the liability that he had to his customer, and the customer had gone out of his shop and come back the next day and bought a coat that was substantially

above—in value above the one they had lost, that the insurance company could not use that as a basis for minimizing their liability, but under those circumstances the customer could have gone anywhere else, also, and many of these losses were adjusted in that manner, and probably some of those same customers came back and bought coats of the plaintiff, but here, the plaintiff negotiated with the customer and agreed not only to replace it, but to make a sale of an article that was substantially higher on the market at that time. Well, he is entitled to his net profit on that article over and [382] above what it would come to if we just take the maximum of liability that he would pay. Do I make myself clear to you? The difficulty is now, if you cannot settle it—and I think you can, is that it was not a two hundred dollar coat that was lost that was replaced by a two hundred dollar retail appraised coat, but sometimes it was replaced by a five hundred dollar coat. Well, the difference between the two hundred dollars and the five hundred dollars was Kirkevold's. That was part of his business, and that is the thought that I have in mind in suggesting this matter to you, so that you can avoid falling into that difficulty.

Mr. Velikanje: If I understand you, Your Honor please, take this example of the five hundred dollar coat. Let's say that cost two hundred and fifty, just using that figure. Then, we would figure that has a loss of two hundred dollars. That is, if it was listed as that on the receipt, at two hundred dollars.

The Court: Two hundred dollars?

Mr. Velikanje: Yes.

The Court: I don't know whether I understand you clearly. If the customer would have recovered by reason of this fire the sum of two hundred dollars.

Mr. Velikanje: That is right. [383]

The Court: Even though his coat was worth four hundred dollars or her coat was worth four hundred dollars.

Mr. Velikanje: That is right.

The Court: The only liability of the plaintiff would have been two hundred dollars to the customer.

Mr. Velikanje: That is right.

The Court: But, instead of meeting that liability in money, after negotiation he sold to the party suffering the loss at retail, a coat for five hundred dollars. My thought is that his net profit on that five hundred dollar coat—assume it would be ten per cent, it would have been fifty dollars. Well, forty per cent of that was the profit he made on the first two hundred.

Mr. Velikanje: So, you would figure a loss of a hundred and seventy-five, is that the way you would figure as to the liability of the insurance company,

The Court: Well, whatever that would figure.

Mr. Velikanje: I mean, on the example you used, he had a fifty dollar—well, it wouldn't be quite that much, it would be twenty per cent on two—

The Court: It would be a hundred and eighty dollars. That is right, that is the thought that I have in mind. It seems to me that comes as near doing exact justice—— [384]

Mr. Velikanje: I hope to heaven Kirkevold has kept some records.

The Court: How many of this type of items are there?

Mr. Velikanje: I would say over half of them.

The Court: Well, he has the records. He has the records of course, of the value that they placed upon the garment that was replaced, because that is—I think that appears in these——

Mr. Velikanje: Yes, we have a record of the value—of the insurable value of that item,—of the item that was lost.

The Court: Yes.

Mr. Velikanje: Whether he has all his purchase slips and so on and so forth on the new ones——

The Court: Well, I regret that I can't——

Mr. Velikanje: Well, Your Honor, we will have to see what we can work out.

The Court: The issues are quite involved in the first place by reason of this novel type of insurance that we have here, and the defendant may well conclude that they want to take the matter to an appellate court for further consideration, and I want the record to be sufficiently clear that they are not in any way denied their right in that regard, and of course if the parties [385] could—I give this to

you as a suggestion after going through these numerous items, being satisfied what approximately constitutes the net profit to the plaintiff, and did at the time of this loss, and at the time the replacements were made without an endeavor to arrive at the exact penny, because that is going to be impossible, then, it seems to me you would greatly simplify the matter and would in no way prejudice the rights the defendant had in an appeal, but would eliminate from such an appeal the question as to whether or not that covenant in this insurance contract, with reference to replacements, has been met by both parties—but, of course if you can't agree upon that item of what constitutes net profit, then I may have to take further evidence on that and make findings in that regard, so we finally get litigation that involves a small amount of money and a large amount of litigation.

Mr. Velikanje: Well, we will try, Your Honor.

Mr. Hutcheson: We will try.

The Court: Yes, and then I shall just either leave these in the files, if you wish, or give you back——

Mr. Velikanje: You might as well leave them in the files. We have copies and if we have to change them, we can.

The Court: They are not marked filed, and I [386] do not think I will have the clerk mark them "filed." You have in them the names of these different claimants. If you have got copies of them, you would not need these, particularly. I do

think, however, any findings that I finally find, they should set up the name of each of the claimants and the amount as you have done here, because that then will take that issue out of the case so far as the lower court is concerned, and then if you will further stipulate, based upon the contingency that you will be able to agree upon a basis of calculation, that the findings and conclusions of law and so forth may be signed here. I am not going to ask you to do that if you do not care to, but it will just delay you that much longer. If you are fully agreed, I will be in Yakima, according to the present plans, to hear Naturalizations. I have just talked with Judge Black by long distance, I think very early in May.

Mr. Hutcheson: We are perfectly willing to stipulate, they may be signed either at Tacoma or Yakima, whichever is most convenient.

The Court: Very well.

(Whereupon, adjournment was taken.) [387]

[Title of District Court and Cause.]

Be It Remembered, that on the 2nd day of May, 1946, at the hour of 1:30 o'clock p.m., the above-entitled and numbered cause came on for presentation of findings of fact and conclusions of law and judgment and decree before the Honorable Chas. H. Leavy, one of the judges of the

above-entitled court, sitting in the United States District Court in the city of Yakima, State of Washington; the plaintiff appearing in person and by his attorneys of record, Velikanje & Velikanje, by E. F. Velikanje of counsel, and defendant appearing by its attorneys of record, Cheney, Hutcheson & Gavin, by Elwood Hutcheson of counsel;

Whereupon the following proceedings were had [388] and done, to-wit:

The Court: Now, this case of Meryl Kirkevold versus Home Insurance Company, are the parties ready to proceed?

Mr. Velikanje: We are, Your Honor.

Your Honor, pursuant to your ruling in Tacoma at the last time, we went into this matter and attempted to work out a schedule of these coats and actual costs, and the amount that the customer had paid, what the retail value of that was, and what the luxury and sales taxes were, and a computation on this whole matter. I have shown Mr. Hutcheson part of it, but I had not completed it the last time we had a discussion. The computation on cost of replacements figured from Mr. Kirkevold's 1945 income tax return—the 1945 income tax return we have taken 1945 because that shows a normal year. '44, during a large part of the year he was burned out—in other words, unable to do business. The coats were replaced in 1944, and therefore the replacement of some of those coats would not show a normal year's operation, so we have taken the '45 schedule, which is—an income tax return was pre-

pared by E. W. Frame, an accountant in town, and it was prepared independent of anything that had to do with this case. It was prepared before this question ever came up, and from that it shows his cost of doing business—now when I [389] say “cost of doing business,” the figure I am stating now is based on his purchase cost. In other words, a mark-up cost of doing business is 51.52 per cent. In other words, if he had a coat that cost one hundred dollars, he would have to sell that coat for a hundred and fifty-one dollars and fifty-two cents to break even, based upon his costs without any consideration of any profits for himself or anything for what he has done in the matter.

We then took the amounts as shown on this purchase price of the coats, the material—the actual material for the coats themselves without any alteration, without any sales or anything, costs ten thousand eight hundred and forty-one dollars and sixty-five cents.

The Court: That was the replaced coats as distinguished from those where the loss was paid directly?

Mr. Velikanje: That is the actual costs.

The Court: Of the coats that were replaced?

Mr. Velikanje: Yes, and then naturally on those coats it was necessary to have alterations, repairs, changes, and sales, rent, and all the other matters, which I state cost him 51.52 per cent. Now, 51.52 per cent of that figure is five thousand three hundred and eighty-four dollars and eighty-seven cents.

It would be a little higher than that, because there is three hundred and eighty-eight [390] dollars in materials ~~there~~ that I had not figured in computing that, and then his actual cash value of what he paid out, in actual cash settlements was fourteen thousand thirty dollars. We have a discrepancy in that. From the sheets we have here, it shows fourteen thousand thirty dollars.

The Court: Wouldn't that make a sum greater than the sum you claimed for the loss?

Mr. Velikanje: It does, and then off of that we have taken—he collected on these—collected his luxury tax and his sale's tax, and he also on many of the coats, he collected an amount above the replacement. In fact, there were very few of them that it was an actual trade and trade about,—some of them were, but the majority of them, there was a cash difference.

Now, without even figuring any profit on this cash difference, I believe the Court held we were entitled to profit on this cash difference, but even without figuring that, and taking away from that the sales' tax that was collected, it left an amount of one thousand one hundred and fifty-one dollars and one cent that he collected from customers that was taken away from the amount, is a difference—it is the replacement cost plus the cash expenditure, was one thousand six hundred and eighty-nine dollars and fifty-one cents more than [391] the amount we claimed under our proof of loss. In other words, the actual amount of replacement, together with his

cost of doing business is greater than the amount that he had claimed under our proof of loss.

The Court: There is no reason to consider it then. I do not think the Court is warranted. I do not know that it legally could make an award for something other than that indicated by the proof of loss.

Mr. Velikanje: We have not asked for it.

The Court: And if that be a fact, there is no reason to consider the replacement. The thing that the Court is concerned in here, and which was raised on the Court's own motion was that under the terms of this contract of insurance, the insured agreed to pay an actual loss sustained, but did not agree to pay a margin of profit to the merchant, and with so many of these replacements that matter was mentioned frequently in the course of the hearing. On the face of it, it looked as though there were many sales made that otherwise would not have been made, that carried with them a net profit.

Mr. Velikanje: Well, that was my belief, too, when we argued that, but I was surprised to see the result obtained from our computation.

The Court: I will hear from you, Mr. Hutcheson.

Mr. Hutcheson: Your Honor please, I had [392] hoped that we could reach an agreement on these facts, but the matters as counsel just stated, are so utterly—so ridiculous, of course we could not agree to that.

Mr. Kirkevold, the plaintiff, has already testified that he—while he did not go into figures, he tes-

tified that he did make a profit on these replacements, in view of the fact that the cost to him was less than the amount that he would have been paid in cash, if he had made cash settlements with them. There are several objections we have to counsel's statement here. Of course, we are not stipulating the facts, because we do not believe those facts are correct, but counsel has taken into consideration there—I saw the figures before they were completed, although as counsel said I have not seen the complete figures. He has made a deduction—in other words, to arrive at this 51.52 per cent—or first, let me say this. Counsel has not stated the figure, I do not believe, but it was 58.22 per cent of the retail selling price, represents the wholesale cost. In other words, there was a profit—a gross profit there of forty-one and seventy-eight hundredths percent gross profit on the replacement of these coats, which of course is quite a substantial margin. In order to make up that difference there, they have taken into consideration a number of things which [393] we contend are not proper to be considered. One is, they have taken into consideration a very large sum—thousands of dollars, I don't have the exact figure, of rent that they call it rent. It was paid to the Barnes-Woodin Company. In other words, they have a rather high percentage on sales here, whereas, as I shall point out, these were not sales at all. They were replacements. There was no reason for any payment that I can see, or certainly that we should not be charged with the full

amount of rental or payment to Barnes-Woodin, the same as though these were ordinary sales.

The Court: The question there, it seems to me, to be if the plaintiff accounted to Barnes-Woodin on the replacement for his percentage of sales, then it should be counted. If he did not, it should not be. I have got to get this case concluded. I should reopen it right now, and put him on the stand if you want to, and further complete the record.

Mr. Hutcheson: Very well.

The Court: I want to make it brief, because——

MERLE KIRKEVOLD

produced as a witness on behalf of the Defendant, after first being duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

Q. Mr. Kirkevold, I take it that one of the larger items of general overhead expense that you have taken into consideration here, is rent, is that correct? A. Yes.

Q. What was the figure—that of rental, that you took into consideration in arriving at these figures?

A. Well, the store. We are a leased department, and the store get—takes twelve and a half percent of all the sales that comes through. Everything is handled through the office, that comes through the fur department.

(Testimony of Meryl Kirkevold.)

Q. And was that—is that based on a written lease or a written agreement with Barnes-Woodin Company? A. Yes, sir.

Q. Do you have that here with you?

A. A copy of our agreement?

Q. Yes. A. No, I don't.

Q. Did you actually in 1944 and 1945, pay to the Barnes-Woodin Company or its successor, twelve and a half percent of its based on these replacement coats? In other [395] words, we are referring to these cases where you made settlements with customers by furnishing them other coats as distinguished from cash settlement—was that included in the amount paid to the Barnes-Woodin and Company?

A. Well, you mean where there was no cash changed hands?

Q. Yes. A. No.

Q. In other words, where there was no cash sales made of the fur coats, you did not include those coats in the amount you paid to the Barnes-Woodin Company? A. No.

The Court: Suppose you replaced a customer's coat where they claimed a loss of two hundred dollars, and you replaced it with a three hundred dollar coat. Then you had a hundred dollars cash involved?

The Witness: Yes, sir.

The Court: Now, in that instance did you pay the Barnes-Woodin Company twelve and a half per

(Testimony of Meryl Kirkevold.)

cent of the hundred dollars, or of the three hundred dollars?

The Witness: Well, it would be—I would write up the cash we took in.

The Court: Just the cash?

The Witness: The cash we took in.

The Court: I think that is sufficient on [396] that matter. That indicates to me that this rental would have to be taken out of this calculation, up to—because the cash that he got of course can't be figured in. It is not claimed—he did not claim a loss on that, but I wanted and I hoped that that could be done, and it should be done, if counsel both sit down here in the manner which you should, and carry out the idea that the Court has. The Court has the idea that under this policy he should not profit, but the covenant of the policy in reference to covering a loss and making a replacement should be lived up to. I am conscious of the fact that in all probability this case will be appealed. I have no objection to its being appealed, but I do want it to be completed, and I do want the Appellate Court to know the position of the lower court in making a disposition. If the twelve and a half percent is charged against the replacement, of course, it has no place in there, because on that he did not figure twelve and a half percent.

Mr. Velikanje: Your Honor, his statement to me was not that. He said some were and some were not on the sales. I don't know, I would like to interrogate him on that point.

(Testimony of Meryl Kirkevold.)

The Court: I don't think, Mr. Velikanje, with all of these many items—that is the reason upon [397] several occasions the Court suggested that the details be worked out independent of taking the Court's time for them. He knows if he had a general policy there, and I am not going to try this case, retry it, nor go into two or three hundred items here.

Was it your policy that when you replaced a customer's coat with another coat, and there was no cash involved, that that did not go in upon which you paid the twelve and a half percent rental?

The Witness: Where a customer had—say she had two hundred dollars on her receipt. Suppose she was entitled to two hundred dollars. I would take the price of the coat. Of course, I would have to figure a tax, and I would just deduct that two hundred dollars from the sale, and that way, and that is how I arrived at that, the cash figure.

The Court: And the cash you accounted for at twelve and a half percent to your landlord?

The Witness: Uh-huh.

The Court: But, the replacement, did you account for?

The Witness: No.

The Court: And the replacement was on a retail basis, rather than a wholesale basis?

The Witness: I think so. [398]

The Court: That is the reason I hoped you could either agree upon what percentage becomes his overhead, or else the Court will have to adopt some

(Testimony of Meryl Kirkevold.)

figure, not arbitrary, but the witness would have to testify to it, and it would have to be somewhere in reasonable approximation, because we cannot get exactness in a situation such as is presented.

Mr. Velikanje: Your honor, here is one point that bothers me. This policy states the cost of replacing like material and like quality. Now, I am advised by Mr. Kirkevold that this two hundred dollar amount would not replace most of these coats. In other words, let's say a woman put her coat in, as you remember the testimony. With the normal charge they insured it up to two hundred dollars, but let us say that a woman put in a five hundred dollar coat. She did not want anymore insurance on it. She paid merely the two hundred dollars. Now, the testimony in the beginning of these figures has been that the figure of two hundred dollars has been used when that was on the receipt because they were limited to that amount, but to come under this policy it states that it must be a replacement of like material and like quality. Now, many of these women in the taking of a new coat, or a coat back, took of a lesser quality when they were [399] replaced to them, because they could not be replaced with a five hundred dollar coat with a two hundred dollar figure.

The Court: I appreciate that, and the fact you can not take the literal terms of this insurance contract with the loss that was sustained here and attempt to give application to them, because it is humanly impossible to do it. There are so many

(Testimony of Meryl Kirkevold.)

different items and so many different situations that exist, so we must be somewhat practical in arriving at what would be justice between the parties, and in these replacements I shall assume that the insured had the same ability to buy at wholesale that the plaintiff did, and whatever he pays for those things in wholesale, and whatever added expense there was to the transaction, fairly and equitably charged and not for the purpose of getting the letter of the law, but rather the spirit of the situation—that is, he is entitled to——

Mr. Velikanje: Without any consideration of his own labor?

The Court: I would say in this case, yes, without any consideration.

Mr. Velikanje: Because he works in his own fur department——

The Court: Because those things just can't be.

Mr. Velikanje: It seems impossible to work out any figure.

The Court: But, he ought to have some basis upon which he did business, excluding his rent, because—that is, excluding these transactions by his own statement. Now, somewhere there is a figure that fairly represents the exact figure. It might vary every day, and you might cut the day down to hours, but we are not going to do that, but somewhere there is a figure that represents what was his overhead on these replacements, whether that was fifty percent or that was twenty-seven percent.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: Would we not reach the proper figure by taking our costs of replacements and taking from that figure twelve and a half percent of that, and deducting it from the amount that I have?

The Court: If that is the only item that Mr. Hutcheson questions. If there is another, I want to know it, because——

Mr. Hutcheson: I wonder if I could ask just a few questions about a couple of other items.

By Mr. Hutcheson:

Q. With reference to your payments to your employees,—salary—the salary items. You did not pay any [401] commissions, did you, to any employees, based—salesladies, based upon these replacements, did you?

A. I have a salesgirl that usually handled most of the transactions where they took the coat, that she gets so much a week, and I think it is five percent over a certain amount—like over a thousand dollars a month, see?

Q. In arriving at that, whether or not it exceeds the one thousand dollars in computing her commission if any above that, you handled that, didn't you, the same as the rent? That is, you did not include these replacements unless the customer paid cash in addition, isn't that right?

A. Where they bought a new coat, is that what you mean?

Q. I am referring to these replacements.

A. That was figured.

(Testimony of Meryl Kirkevold.)

The Court: No, what Mr. Hutcheson is asking you, as I understand him—let me take a concrete example, because it might bring it out. The customer has two hundred dollars under the contract of insurance that you sought to replace under the lost garments, they had a garment that cost three hundred dollars. The young lady that handled the sale would get a five percent on the three hundred dollars, or the one hundred?

A. That would be worked the same as—— [402]

The Court: The rent?

The Witness: Yes.

Q. The commission would be on the cash excess, or the one hundred dollars? Speak up.

A. That is right.

Q. Now, on this matter of taxes, on the twenty percent federal luxury tax, and the Washington State three percent sale's tax, both of which just apply to sales of fur coats, you have not paid taxes, have you, on these replacements, disregarding the cash? In other words, disregarding any additional tax that might have been paid by the customer, but just the replacements. In other words, the two hundred dollars in the example that the Court gave you have not paid taxes on that two hundred dollars, have you?

A. No.

Q. Pardon? A. No.

Mr. Velikanje: Mr. Hutcheson, might I interpose there that those taxes are all handled by the Barnes-Woodin Company. Whether those taxes

(Testimony of Meryl Kirkevold.)

have been paid I don't know. I briefed that matter at the time this matter came up. My advice to Mr. Kirkevold was to collect this tax and to pay it, and from my briefing the question at that time, he was obligated for it, and [403] in this sales matter, I have a book he kept during that time, and the tax was collected on all of those coats.

The Court: No, that is the point, that he collected.

Mr. Velikanje: He did.

The Court: In the example that was given with three hundred dollars, you——

The Witness: The tax was figured on the whole price of the garment, on the retail price of the garment, if that is what you mean.

Mr. Hutcheson: Well, supposing—take an example where a customer did not pay additional cash, of which there were quite a large number I believe, but assuming she was entitled to a two hundred dollar coat and she obtained the two hundred dollar coat without payment of additional tax, she did not pay you any tax, did she?

The Witness: Where I had to give the customer a coat to satisfy her, I would—I mean to keep the good will of the customer—just an exchange of coats, where there wasn't any money changed hands, is that what you mean?

Mr. Hutcheson: Yes.

Mr. Velikanje: Might I interpose right here and offer this as a record that was kept at the time.

(Testimony of Meryl Kirkevold.)

[404] I think it will show to Your Honor better than what can be done here.

Mr. Hutcheson: I object to your interposing.

The Court: We will have to get along, Mr. Hutcheson. You can direct a few questions that cover this whole situation rather than go into an extended detail, because if this case has to be opened again, and I don't intend to unless there is a very unusual situation. I want to make a disposition of it, and I want to make it as short as I can, but I hoped what the parties would do, would be that you would arrive at what was his cost of doing business, not in the overall business, but insofar as it affected this type of unusual transaction, so that we could measure. Probably the Court will have to go back to its original position, and the defendant, I don't think is so much concerned with that as they are concerned with the major questions here, my original position was, except that I raised upon my own initiative that whatever his losses were, they were measured by sums that were mentioned in the policy, but that to me, it seemed inequitable because there was a margin of profit perhaps made. When we got into this case it was not plead. It was brought up by the Court alone, but I never intended to even remotely suggest that we are going to take each one of these items, and [405] we are going to attempt by calculation to figure exactly what the loss was, because that is humanly impossible to do it, and I would rather, if it were possible this witness to say fairly and squarely

(Testimony of Meryl Kirkevold.)

what his percentage of overhead was. He put it at 51 per cent, but now we find seventeen and a half percent of it should go out, now, if there is an additional twenty percent of taxes included in this 51 or 52 per cent, that should not be in there it ought to be mentioned.

Mr. Velikanje: Taxes are not included in this percentage.

The Court: They are not?

Mr. Velikanje: No.

The Court: Very well, let's proceed.

Q. What is your wholesale cost, Mr. Kirkevold, in your business as compared with your retail selling price. That is, I have discussed that with you and your attorney. Do I understand correctly that your wholesale cost, not including for the moment the general overhead, if fifty-eight and twenty-two hundredths percent of the retail selling price? If that a fair figure?

Mr. Velikanje: That was the '45 figure, Mr. Hutcheson.

A. If that was the figure that Mr. Frame computed there for me, that is what he figured it out.

Q. To refresh your recollection, do you want to refer to that document?

Mr. Velikanje: Mr. Hutcheson, by the deduction of these other amounts, that figure would be increased, naturally.

Mr. Hutcheson: No.

Q. You can refer to any document you may have here, but I am talking now for the moment

(Testimony of Meryl Kirkevold.)

about your wholesale gross cost as compared with the retail selling price, what you paid to the manufacturer or wholesaler for the coats. That averages, does it not, 58.22 per cent of the retail selling price?

A. If that is the percentage that Mr. Frame figured out from the income tax form.

The Court: Well, look at it and see.

A. (Continuing): That would be the only way.

Q. It is according to my notes?

A. Yes, that is right.

Q. That is right. In other words, the margin of gross profit is forty-one and seventy-eight hundredth percent. That is correct, isn't it?

A. Yes.

Q. And one other question about the taxes. I asked you as to whether the customer paid you. You have not paid the federal or the state on the taxes on these replacement [407] coats, have you?

A. Where no cash took place?

Q. Yes.

A. Changed hands?

Q. Yes. A. No.

Q. And in these cases where there was an additional cash payment, like taking the case that the Court suggested, where the customer was entitled to two hundred dollars but paid one hundred dollars extra and got a coat for three hundred, what taxes if any did you pay on the transaction of that kind?

A. Well. I figured it from the whole retail price

(Testimony of Meryl Kirkevold.)

—I mean, the twenty-three percent, the retail price plus twenty-three percent, less the two hundred.

Q. You say less the two hundred?

A. Uh-huh.

Q. That is, you did not pay any taxes based on the two hundred?

A. No. Well, on the retail price, if the two hundred is involved in the retail price the tax would have been considered—the two hundred would have been considered as part of the full price of the coat—the retail price of the coat.

Q. You say you deducted the two hundred dollars, didn't you? [408]

A. When I collected from the customer, yes.

Q. And when you remitted the tax to the federal or state, you deducted for the two hundred dollars, didn't you?

A. No, that all went through as part of the sale. I only wrote up in the books, I imagine or I—the sale was written up but the customer paid the difference and that is the way it was written up.

Q. Then, the taxes were remitted on the same basis, weren't they, based on the cash the customer paid?

A. Yes, I suppose they were.

Mr. Hutcheson: May I see that, just to see what other overhead items there are?

Q. Oh, yes, there is an item here of nineteen hundred and two dollars advertising, is that correct?

A. Yes.

Q. In other words, that was the total figure you paid during 1945 for advertising fur coats for sale?

(Testimony of Meryl Kirkevold.)

A. For sale and for work and everything, I mean, the department—it covered the advertising for the fur department.

Mr. Hutcheson: I wonder if we couldn't put a copy of this in evidence. I would like to.

The Court: Mr. Hutcheson, the Court did not dream of having to open this case again, and certainly I have got another assignment at Walla Walla, and I am just questioning whether it is necessary to into [409] those details, for you to make your record. I am coming to the conclusion rather rapidly that I have made a mistake by first suggesting this matter, and it leads into a field so complex and so difficult of exact ascertainment I would be warranted in concluding I could not judicially determine. These items you are now raising to me are quite technical, and I am much inclined to go back to my original position that the loss be measured as proven and then you can take your exceptions and appeal the case.

Items such as advertising in doing business are not proper items to attempt to deduct on these various items, and you just simply tend to establish to this Court how improper, perhaps it was for me to originally suggest that we get down to the actual cost, because it is impractical and impossible of ascertainment.

Mr. Hutcheson: If I can make this suggestion, I think that should be arrived at then at least by taking out of consideration the rent and taxes, because so far as actual replacements are concerned,

(Testimony of Meryl Kirkevold.)

the rent and the taxes should not be taken into consideration out of that.

The Court: There is an item of twelve and a half percent for rent and a five percent item for sales—commissions paid on sales, and I am satisfied those should be deducted from the figures he gives as his cost of doing business.

Mr. Velikanje: Your Honor, on that five percent, I thought Mr. Kirkevold told me it was three percent.

The Witness: Altogether, her salary and her commission, I think it was.

Mr. Velikanje: Well, you paid her salary, no matter what happened?

The Witness: Yes, sir.

Mr. Velikanje: That thirty-five dollars is not figured in the percentage. She has to make so many sales before she gets into the percentage?

The Witness: Yes. Some weeks she does not do it.

Mr. Velikanje: It is possible to ascertain——

The Court: But I shall adopt a figure of five percent there, because the evidence indicates that the salesmen were going into that class where they were getting five per cent.

The Witness: The salary and the percentage. She actually gets three percent, but I was thinking of the overall figure I pay the salesgirl. That would amount——

Mr. Velikanje: In that salary, I am wondering

(Testimony of Meryl Kirkevold.)

[411] whether, using this '45 figure, if we should not go back to the '44.

The Court: What the Court had in mind was that the parties—and in an endeavor to get this litigation finally concluded as far as this Court was concerned, would be able to check the figure in spirit of compromise—get it about what would be fair, twenty-five percent or thirty percent or thirty-five. That would be added to or deducted from, as the case might be, and settle it. The Court would determine it on such a basis, but I never had any thought of holding this matter up. All these details will get us nowhere in the end, except more confused than ever.

Mr. Hutcheson: May I ask this question?

Q. Mr. Kirkevold, would you give us in all fairness a figure to the best of your judgment, that would represent the percentage of actual net profits in connection with the handling of these replacement coats, taking into consideration the fact that you have not—to the replacement or the two hundred dollars in these examples that we have given you in these questions, that you did not pay the rent or sale's commission or taxes on that, taking those facts into consideration, what would you say in all fairness would be your percentage of actual net profit on these replacement coats? [412]

Mr. Velikanje: I object to that.

A. I couldn't say. I am not much on percentages. The only way I can arrive at any percentages is just from figures, but I couldn't say.

(Testimony of Meryl Kirkevold.)

The Court: Well, you were not doing business at a loss.

The Witness: No.

The Court: And before the fire or just before the fire occurred, what was your margin of profit in your business—your net?

The Witness: Well, I really don't know.

The Court: Well, what was it the year following?

Mr. Velikanje: That shows 11.78 per cent is net.

Mr. Hutcheson: In other words, that was your margin of net profit in 1945, taking into consideration all of these expenses. That is correct, isn't it, rent, and everything.

The Witness: Yes.

Mr. Hutcheson: Now, how much more than that would you say your margin of net profit in percentage would be on these replacement coats, as to which, as you have already testified, you did not have that full amount you spent for rent and these other things. [413] How much more than that would the percentage be on those replacements?

The Witness: Well, I couldn't give you a figure because I really don't know—don't know.

Mr. Hutcheson: Well, we offer in evidence this document from which I think the computation can be made of percentage by eliminating the rent item.

The Court: It will be admitted in evidence, but the Court will make the statement it wouldn't be possible for anyone, even in Einstein, I think, in the situation that confronts the Court to deter-

(Testimony of Meryl Kirkevold.)

mine the exact profits to be made on these replacements. Some of his records are gone. Others were not kept at all, and whether it is proper or improper to charge the full twelve and a half per cent that was paid as rentals, as sales or no charge at all, and by reason of another unusual condition, doing business where he compensated his sales people on the salary and the commission basis, it leads to further confusion and added to that, most of these replacements are coupled with an additional item of a sale of an article that exceeded the replacement, all of which means the only way the Court can even approach exactness is to get some general overall figures, and then adopt a figure from that, that is not too much in the field of the arbitrary and seems to about measure the situation, [414] and here, if his net profits were eleven and a half per cent the year before, or approximately that, and following that and allowing three and a half per cent instead of five per cent for commissions and sales, that would be chargeable as against this replacement up to insured value, and plus twelve and a half per cent upon which no rental charge was made, we would have a figure around twenty-seven and a half per cent. That is doubtless high, because you cannot completely divorce all of the activities of this business from all of these others. I think a figure though, measured by twenty-five per cent on replacements is a fair figure, and I think I shall find that—determine that issue that way.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: You mean then, we take our replacement costs and add twenty-five per cent to it, is that what you have in mind?

The Court: Well, I am not sure which, to take an example or a situation where we can make calculations, he charged the customer two hundred dollars for an article that cost him we will say a hundred and fifty dollars, and he had a twenty-five per cent——

Mr. Velikanje: Then, we would have to take our retail price, and take off——

The Court: As your base. That is correct. I think that is correct. [415]

Mr. Velikanje: That figure is seventeen thousand five hundred and sixty-seven dollars and sixty-two cents.

The Court: Of replacements?

Mr. Velikanje: Yes.

The Court: And then, deduct from that twenty-five per cent?

Mr. Velikanje: That is right.

Mr. Hutcheson: Let me ask, Mr. Kirkevold, is the figure Mr. Velikanje just gave correct, the retail selling price, if you had retailed them, of these replacement coats seventeen thousand five hundred and sixty-seven dollars and sixty-two cents, is that figure correct?

Mr. Velikanje: I computed this, Mr. Hutcheson.

The Witness: That is the total of the retail sales column.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: You gave me these figures?

The Witness: Yes, I gave you those figures.

The Court: That will be the determination of the Court on that item, and the other of course is not one that is in dispute. That is, where the cash was paid, and that should conclude this matter excepting the formal findings, but so far as the sum of money that measures a recovery is concerned.

Do you have anything further, Mr. Hutcheson, in connection with this case? I appreciate that you will perhaps have to modify your findings that have been submitted here.

Mr. Hutcheson: Yes. Well, will Your Honor be in town the rest of the afternoon?

The Court: No, I am not. I have to start for Walla Walla.

Mr. Hutcheson: Well, it is already stipulated the documents can be signed in Tacoma when in final form. To understand Your Honor's ruling, the twenty-five per cent would be deducted from this total, what would be the retail selling price?

The Court: The replacements, not the other.

Mr. Hutcheson: Yes.

The Court: The other is.

Mr. Velikanje: Now, what will we do as to the figure of money received from customers? You see, some money was received from customers, but all of that is taken up in this tax.

The Court: You mean, where a customer bought an article and paid more than the amount?

Mr. Velikanje: That is right.

The Court: I don't think that figures in your loss at all. [417]

Mr. Velikanje: We will take twenty-five per cent of retail.

The Court: If I understand you correctly, this seventeen thousand represents the retail price on the replacements that were made by the insured, but has nothing to do with the amount paid over and above that.

Mr. Velikanje: That figure is the retail price of the coats that were sold then, some people came in and paid additional cash.

Mr. Hutcheson: I think that should be deducted. Can you give us the total of those cash payments?

Mr. Velikanje: Yes, but that will have to be deducted, this cash.

Just a moment. I want Your Honor to see the record which was kept on this, to show this tax matter. That is the book the girl kept off of the sales slips. Mr. Kirkevold does not keep the books. The company keeps the books. He had a girl making these settlements, put a special girl on to make the settlements. We have not figured anything in for that, but that shows that the sales tax was collected on each one. Now, whether he has paid that or not is immaterial, because that tax is necessary to be collected, and he collected it from each of those, and that should be deducted from the amount the customer paid in. [418]

The Court: I don't know. This does not throw very much light, and I can't quite follow you in your argument. Mr. Velikanje, now I don't get

that. I understand the witness to say when he replaced a garment that had a two hundred dollar policy of insurance on it with a two hundred dollar article, he made no sales tax calculation whatever.

Mr. Velikanje: No, I don't believe he stated that.

Mr. Hutcheson: That is what he said.

Mr. Velikanje: He stated——

The Court: But, if he got three hundred dollars out of the transaction, then there was a hundred dollars upon which he collected a sales tax.

Mr. Velikanje: Here is a coat of Squirrel Locke Brown, retail price of that coat was a hundred and ninety-nine dollars and seventeen cents, to which was added thirty-nine dollars and eighty-three cents, marked here as a federal tax, making a total of two hundred and thirty-nine dollars. From that coat they collected fifteen dollars from the customer. In other words, a lot of these customers said they did not want to pay the difference. There was tax put in there of thirty-nine dollars and eighty-three cents.

The Court: If that was his practice throughout, [419] he did not testify to that fact.

Mr. Velikanje: That is what I was trying to get this shown in here. He does not understand about his books. He does not keep them.

Mr. Hutcheson: He is the plaintiff here.

Mr. Velikanje: I know he is the plaintiff. I am trying to bring out the facts in this case.

Mr. Hutcheson: Let me ask, Mr. Velikanje, can

you give us the total in cash paid by the customers as additional payments in connection with the replacements that enters into this seventeen thousand five hundred and sixty-seven dollars and sixty-two cents?

Mr. Velikanje: Four thousand seven hundred and twelve dollars and forty-seven cents.

The Court: What is that item?

Mr. Velikanje: That is what customers paid additional. Now, that is the item that Your Honor said we are entitled to our full profit on. How we are going to figure that in here I don't know,—it is beyond me.

Mr. Hutcheson: I think that should be deducted from the seventeen thousand.

The Court: It isn't in the seventeen thousand at all.

Mr. Velikanje: Yes, it is, because that is [420] the complete price, but of that four thousand seven hundred dollar item, three thousand five hundred and sixty-one dollars and forty-six cents is taxes—was collected as tax, so that there is a difference there of about twelve hundred dollars, and I think the twelve hundred dollars should be deducted.

Mr. Hutcheson: I think the twelve hundred should be deducted from that seventeen thousand figure, and then deduct twenty-five per cent of that and I think that is the answer to the whole thing, under Your Honor's ruling.

Mr. Velikanje: Well, that is right.

The Court: Very well, if the parties will stipulate to that fact the Court will so determine.

Mr. Hutcheson: That is, I think.

The Court: For the record I have indicated two or three times, and I do again, if in this case you want to go on up, and you want to make this an issue in the case, the record in the case shows it is humanly impossible to make a calculation of the many, many items, including the numerous charges that might be proper charges, and the unusual situation that confronts the Court in considering the question as to the whole, when viewed from the light of this particular business, and the manner in which the business was being done. [421]

Mr. Hutcheson: Now, I will stipulate that it seems to me that is the correct method of making the mathematical calculation, in line with Your Honor's ruling. It seems to me we should work it out that way.

The Court: Very well.

Mr. Velikanje: To dispose of it, can we work out these figures right now and stipulate on them so there won't be any further dispute and get our judgment entered? It would take us about three minutes to work this out.

The Court: Yes, but you don't mean I will sign the findings?

Mr. Velikanje: If we can stipulate and definitely decide it, and I will draw up the findings, and we will know where we stand on it.

The Court: Well, you might state your figure to the Court and we can settle it on that.

Mr. Velikanje: The retail price of these coats, replacements was seventeen thousand five hundred

and sixty-seven dollars and sixty-two cents. Deducted from which would be the difference between the tax and the amount collected from customers, of one thousand—wait a minute. One thousand one hundred and fifty-one and one cent, leaving the cost of replacement then at sixteen thousand five hundred and sixty-seven dollars and sixty-two cents.

The Court: Did you say one thousand and fifty-one dollars?

Mr. Velikanje: One thousand and fifty-one dollars and one cent.

The Court: Then, it would not be sixteen thousand, four hundred and sixteen dollars?

Mr. Velikanje: No. Our first figure was seventeen thousand five hundred and sixty-seven sixty-two. That is right, it is sixteen thousand four hundred and sixty-seven.

Mr. Hutcheson: Sixteen thousand four hundred and sixteen, sixty-one.

Mr. Velikanje: That is right.

The Court: And then deduct from that one-fourth, or twenty-five per cent.

Mr. Velikanje: Four thousand one hundred and four dollars and fifteen cents.

The Court: Yes. Leaving that item twelve thousand three hundred and twelve dollars and forty-six cents.

Mr. Velikanje: That is added to which will be the cash settlement of fourteen thousand five hundred and seventy-three dollars and ninety-nine cents.

The Court: Ninety-nine cents?

Mr. Velikanje: Yes. [423]

Mr. Hutcheson: Are you sure it is that much? I thought it was just a little over fourteen thousand.

Mr. Velikanje: The actual amount taken off the checks is fourteen thousand——

The Court: Twenty-seven thousand two hundred and eighty-six dollars and forty-five cents.

Mr. Velikanje: Making a total now in the amount of nineteen thousand eighty-six dollars and forty-five cents.

The Court: How much?

Mr. Velikanje: Making a total of judgment of nineteen thousand eighty-six dollars and forty-five cents. They paid eighty-two hundred.

The Court: That was paid.

Mr. Velikanje: Yes.

The Court: Well, the rest of it is not in dispute. It becomes a matter of calculation.

Mr. Velikanje: Your Honor, in drawing up these findings, do you want each coat listed?

The Court: Well, how did you have that covered before?

Mr. Velikanje: Covered before we had the testified value?

Mr. Hutcheson: The proposed findings list each coat with the appropriate figure, and I think the [424] findings that are signed should be done that way.

Mr. Velikanje: I don't think Your Honor it is necessary to put each coat in where we have reached an arbitrary figure on the judgment.

Mr. Hutcheson: I have already added those cash settlements and I don't get that much. I doubt if that figure is right. I get fourteen thousand one hundred and six dollars and four cents by adding the cash figure stated on the releases.

Mr. Velikanje: There was an additional three hundred and eighty-eight dollars and sixty-five cents that was shown on repair of coats, actually expended on those coats that is not shown. That is another item, Your Honor. They turned over to us all of the material that we could salvage, about three of the coats by replacing the sleeves and by using the pieces that were salvaged.

The Court: I cannot see any necessity, Mr. Hutcheson, of going to a lot of labor of setting forth each coat, and the deductions to be made from it where the Court has not taken an arbitrary figure, but has taken a figure that approximates as nearly as it can be done what the deductions should be to the insured by reason of the replacing, instead of collecting directly, because not one of them would represent an exact figure, [425] and the Court has repeatedly so said and it cannot.

Mr. Hutcheson: That probably could be covered by one or two additional paragraphs of findings, as to these figures we have been discussing today.

The Court: Well, I am willing, too. The plaintiff has secured a judgment of recovery herein. The defendant indicates a desire to appeal the case. If the plaintiff has to meet the contentions that will be raised on an appeal, there isn't any reason why the trial court should ask for findings of fact that

are inconsistent with those that have been originally pronounced. If you want to save your record, you can submit such findings.

I hope I make my position clear to you. There is no reason why I should suggest to you that you should submit a set of findings, expecting me to approve them, they are contrary to the oral pronouncement that I have made.

Mr. Hutcheson: As I read the new rules, I do not believe that we are required to submit findings to be denied by the Court, and so I do not see anything can be gained by doing that.

The Court: No.

Mr. Hutcheson: I was not intending to do that.

The Court: But, so far as you can work out [426] the findings, I would like you to work them out and submit them to me. Just send them over.

Mr. Velikanje: I would love to.

The Court: Very well, then.

Mr. Hutcheson: One other point, Your Honor, we may be in agreement on this. I think when the findings are entered that the Court should sign an order fixing the amount of costs and superseas bonds on appeal, how much that should be.

Mr. Velikanje: I told Mr. Hutcheson something around twenty thousand dollars would be sufficient.

The Court: You may make such an order. I am not going to assume that you are going to appeal.

Apparently the amount should be fixed by order of the Court.

Mr. Velikanje: While we are here I will offer

this book, showing the sales records made at the time of the settlement. This was a book kept by the girl working for him in his employ.

Mr. Hutcheson: Objected to as not properly identified.

The Court: It will be admitted then.

(Whereupon, notebook referred to was then received in evidence and marked Plaintiff's Exhibit A-1.) [427]

The Court: That is all in this case, and you submit your findings later.

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,

Official Court Reporter.

[Endorsed]: Filed June 22, 1946. [428]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF EXHIBITS

The court being of the opinion, pursuant to rule 75(i) of the Federal Rules of Civil Procedure, that the original exhibits herein should be inspected by the appellate court;

Now, Therefore, It Is Hereby Ordered that the Clerk of this court is hereby authorized and directed to transmit to the clerk of the Circuit Court of Appeals all of the original exhibits introduced in the above-entitled cause, in lieu of copies thereof; the same to be transmitted at the same time as the remainder of the transcript of record is transmitted to said court.

Done in open court this 21st day of June, 1946.

CHARLES H. LEAVY,

U. S. District Judge.

Presented by:

CHENEY, HUTCHESON & GAVIN,

ELWOOD HUTCHESON,

Attorneys for Defendant.

O. K.

VELIKANJE & VELIKANJE,

Attorneys for Plaintiff.

[Endorsed]: Filed June 22, 1946. [429]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant, The Home Insurance Company of New York, a corporation, and respectfully moves the court that the oral decision of the court herein be vacated and that judgment be entered herein in favor of the plaintiff and against the defendant for not to exceed the sum of \$1800.00.

Without waiving the foregoing motion, the said defendant hereby respectfully moves the court that the oral decision herein be vacated and that a new trial be granted herein for the following reasons and upon the following grounds materially prejudicing the substantial right of this defendant:

1. Irregularity in the proceedings of the court and the plaintiff; and orders of the court and abuses of discretion by which the defendant was prevented from having a fair trial.

2. Accident and surprise which ordinary prudence could not have guarded against.

3. Newly discovered evidence material for the defendant which it could not with reasonable diligence have discovered and produced at the [430] trial.

4. Excessive damages appearing to have been given under the influence of passion and prejudice.

5. Insufficiency of the evidence to justify the decision.

6. Errors in law occurring at the trial.

That the evidence herein was insufficient to justify the decision, in the following particulars:

(a.) There was no evidence which would justify a recovery by the plaintiff herein in excess of the sum of \$1800.00.

(b.) The evidence was wholly insufficient to establish that there was any storage room, within the meaning of the insurance policy contract, on the mezzanine floor of the Barnes-Woodin Department Store, where the fire damage involved herein occurred.

(c.) That the evidence herein was wholly insufficient to establish any liability of the defendant in excess of the sum of \$10,000, by reason of the limitation in the insurance policy limiting said liability to the sum of \$10,000 as to any damages occurring outside of storage rooms, vaults, and safes.

(d.) The evidence was insufficient to establish any liability of the defendant as to any fur garment in excess of the agreed valuation thereof stated on the receipt issued by the plaintiff to the customer pursuant to the provisions of the insurance policy involved herein.

(e.) The evidence was insufficient to justify any recovery by the plaintiff against the defendant herein for fur garments as to which no valuation was stated by the plaintiff on the receipts issued by him to his customers, as required by the insurance policy involved herein.

(f.) The evidence was insufficient to justify any recovery by the plaintiff at all as to fur garments damaged or destroyed in [431] said fire which were replaced by the plaintiff, as distinguished from the plaintiff making cash settlements with said customers, by reason of the fact that the evidence fails to show the actual cost to the plaintiff of replacing the said fur coats; and in any event plaintiff would not be entitled to recover therefor in excess of his actual costs of replacement thereof.

(g.) That the evidence was insufficient to authorize or support a recovery of judgment by the plaintiff against the defendant herein, as to all or any of the fur coats and garments involved herein; and the evidence fails to show with sufficient certainty and definiteness the amount of recoverable loss as to each of said coats.

That the court committed the following errors in law at the trial of this action:

(a.) In admitting in evidence Exhibit 6, the same being a small notebook containing a purported list of plaintiff's insurance policies alleged to have been delivered by Mr. Orkney to the plaintiff; the same being wholly immaterial, irrelevant, incompetent, not the best evidence, and attempts to alter the terms of the insurance policy by parol evidence and without proof of any authority of Mr. Orkney, as a representative of the defendant to alter the defendant's liability under its insurance policy.

(b.) In admitting in evidence plaintiff's Exhibit 4, the same being a purported assignment from an-

other insurance company relative to the McGilvery coat, as the same is immaterial, irrelevant, incompetent, and not sufficiently proven or identified.

(c.) In admitting in evidence plaintiff's advertising circular and newspaper advertisements, as the same are immaterial, irrelevant, incompetent, self-serving, and not binding on the defendant. [432]

(d.) In deciding that the west end of the work-room on the mezzanine floor of the Barnes-Woodin Department Store constituted a storage room.

(e.) In deciding that 75 per cent of the damage to fur coats in the fire involved herein comes within the \$100,000 limit of the insurance policy as to damage to fur coats in storage rooms, vaults, and safes, and that the same does not come within the \$10,000 policy limit as to loss outside of storage rooms, vaults, and safes.

(f.) In holding and deciding that plaintiff is entitled to recover herein any sum in excess of \$1800.00.

(g.) In holding that the maximum limit of defendant's liability by reason of said fire exceeds the sum of \$10,000.

(h.) In holding and deciding that plaintiff can recover herein for more than the cost to him of fur coats replaced by him in lieu of customers' fur coats destroyed or damaged in said fire, as distinguished from cash settlements with customers.

(i.) In holding and deciding that plaintiff can recover herein as to any fur garment an amount in

excess of the valuation stated on the customers' receipt therefor.

(j.) In holding and deciding that plaintiff can recover herein as to any fur garment as to which no valuation was stated upon the receipt issued by plaintiff to the customer as required by said insurance policy.

(k.) In failing and refusing to enter judgment dismissing this action or limiting the further recovery of plaintiff herein to the sum of \$1800.00, in addition to the sum of \$8200.00 heretofore paid by defendant to plaintiff.

The defendant hereby consents that additional testimony may be introduced, and in the alternative makes application to the court [433] for permission that additional testimony be introduced by the plaintiff and defendant herein, showing the actual cost to plaintiff, at wholesale, of the fur coats used as replacements to customers for any of the destroyed or damaged coats involved herein.

This motion is based upon the records and files herein, and upon the minutes of the court, and the proceedings had at the trial of this cause, and upon the affidavit of Elwood Hutcheson hereto attached and made a part hereof.

CHENEY, HUTCHESON &
GAVIN,
ELWOOD HUTCHESON

Attorneys for Defendant.

United States of America,
State of Washington,
County of Yakima—ss.

AFFIDAVIT

Elwood Hutcheson, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant herein, and in charge of this litigation for said defendant.

That at the time of the trial of this action the defendant herein, and affiant, believed and were of the opinion, and now believe and are of the opinion that the burden of proof rested upon the plaintiff herein in order to prove the amount of recovery, if any, to which he was entitled herein, if he was entitled to recover at all, to prove the cost to the plaintiff, that is the wholesale selling price of the fur coats, used by the plaintiff to replace garments lost or damaged in the fire involved herein, as distinguished from cash settlements with customers. That consequently defendant did not introduce testimony on that point. That in truth and in fact more than 40 per cent of the retail selling price of fur coats of a similar nature [434] represents the profits of the retailer, such as the plaintiff herein, and that the wholesale cost to plaintiff for said fur coats for replacement purposes was at least 40 per cent less than the retail selling values thereof. That the amount of recovery of the plaintiff, if any, for fur coats which were replaced to customers,

should therefore be at least 40 per cent less than the retail selling prices thereof as testified to by plaintiff.

That in view of the ruling of the court at the close of the trial that the plaintiff was not required to introduce testimony with reference thereto, the defendant should now be permitted to introduce additional testimony upon that point as hereinabove stated. That defendant hereby consents to the introduction by the plaintiff and defendant of additional testimony upon that subject; and in the alternative, defendant makes application for permission to introduce such additional testimony.

ELWOOD HUTCHESON.

Subscribed and sworn to before me this 18th day of March, 1946.

[Seal]

GORDON HANSON,

Notary Public for Washington, residing at Yakima therein.

Service accepted and copy received this 19th day of March, 1946.

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE,

Attorneys for Plaintiff.

[Endorsed]: Filed March 19, 1946. [435]

Court Room at Tacoma, Washington, April 9, 1946

Present: Hon. Charles H. Leavy, District Judge; Gladys Chitty, Deputy Clerk; Carroll Graham and Hallie Denise, Bailiffs; Russell Anderson, Court Reporter.

[Title of Cause]

Now, on this 9th day of April, 1946, this cause comes on before the court for hearing on motion for new trial. E. F. Velikanje represents the plaintiff and Elwood Hutcheson represents the defendant. Case is called. Both sides ready. Argument on motion by Mr. Hutcheson on behalf of the defendant.

At 11:55 court recessed until 2 p.m.

At 2:00 p.m. court is again in session. All parties present. Argument is commenced by Mr. Velikanje on behalf of the defendant.

The Court now denies the motion for a new trial.

The Court now requests that the parties attempt to agree by stipulation on the net loss plaintiff sustained as to garments replaced, otherwise the court will consider re-opening the case to take further evidence on that issue and make a finding.

Both counsel now stipulate that, based on the contingency that parties agree on calculations, Findings of Fact may be signed either in Tacoma or Yakima. [437]

[Title of District Court and Cause]

PROPOSED FINDINGS OF FACT AND CON-
CLUSIONS OF LAW

The above-entitled matter coming on regularly for trial in open court before the Hon. Charles H. Leavy, District Judge, on the 7th day of March, 1946, at Yakima, Washington, plaintiff appearing in person and by his attorneys of record, Velikanje & Velikanje, by E. F. Velikanje, of counsel, and defendant appearing by its attorneys of record, Cheney, Hutcheson & Gavin, by Elwood Hutcheson of counsel, and the court receiving evidence, oral and written, and there being no appearance by or on behalf of the third-party defendant Dorothy Riggs, and the court being fully advised in the premises, does not make the following

FINDINGS OF FACT:

1.

That the plaintiff is engaged in business as the Barnes-Woodin Fur Department in the City of Yakima, Washington, and has filed with the Clerk of Yakima County a Business Certificate of Assumed Name.

2.

That the defendant Home Insurance Company of New York is a corporation doing business in the State of Washington and duly [439] licensed to do such business in the State of Washington.

3.

That on the 17th day of August, 1942, the defendant, Home Insurance Company of New York entered into a written contract with said plaintiff, whereby said defendant agreed to insure the plaintiff against loss on furs or garments trimmed with fur, being the property of the customers, accepted by the insured for storage, alteration, repairing, cleaning or remodeling, while said furs or garments trimmed with fur were in the custody or in the control of the plaintiff. That said agreement was incorporated in a written contract termed "Furriers-Customers Basic Policy," being No. FC 1824. Said policy further provided, upon an attached endorsement, this policy was extended to cover, during transportation or otherwise, such furs or garments trimmed with fur, the property of customers, for which the assured has issued a certificate of insurance on forms approved by the company; and further provided that an additional premium was made payable for said additional coverage of the issuance of such certificate.

4.

That under the terms and conditions of said policy above-referred to, the defendant company obligated itself to pay loss not to exceed the sum of \$100,000.00 on customers' articles lost or destroyed in storage rooms, vaults and safes, and not to exceed \$10,000.00 on customers' goods outside of storage rooms, vaults and safes.

5.

That at all times hereinafter mentioned, from

and after the 17th day of August, 1942, up to and after the 9th day of May, 1944, said policy was in full force and effect, all premiums having been paid, and plaintiff having complied with all the terms and conditions of said policy. [440]

6.

That on or about the 9th day of May, 1944, a loss was sustained at plaintiff's place of business, at 301 East Yakima Avenue, in the City of Yakima, County of Yakima, State of Washington, which was a loss by fire, originating from an unknown cause and not the result of any negligence on the part of the plaintiff, his agent or employees. That as a result of said fire 152 furs, fur coats, and articles trimmed with fur, belonging to customers, which were in the control and custody of the insured for alteration, repairing, cleaning, remodeling, preparation for storage, return to customers and in storage, were destroyed, of the value of \$27,565.00; said value being exclusive of the articles of Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, Mabel G. Smith and Erma Turnell. The last named six parties, all having been made third-party defendants, have failed to appear or prosecute their claim in said action and are in default. That plaintiff consummated settlement with all of the customers suffering damage from said loss, except the above-named parties who were made the third-party defendants.

7.

That on the 21st day of August, 1944, being within

the extended time of filing proof of claims, the plaintiff caused to be filed with the Home Insurance Company, and its agent Fire Company Adjustment Bureau, Inc., detailed proof of loss, showing loss in the sum of \$29,785.00. That said defendant has in its possession said proofs of loss and the originals thereof.

8.

That thirteen of the customers who suffered loss in said fire had their furs and garments trimmed with furs covered by certificate endorsements, being special certificate policies covering the amount [441] beyond that as listed under the assured's legal liability. That said customers had paid an additional premium for said additional coverage, and had filed with said company due proof of loss. That under a letter, dated October 4, 1944, the law firm of Cheney & Hutcheson, appearing for and on behalf of the defendant herein, returned to said customers and policy holders their proof of loss with a notation that settlement would be completed with them.

9.

That seventy-five percent of the furs, fur coats, or garments trimmed with furs, belonging to customers and destroyed in said fire, were situated in a storage room of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington. Twenty-five percent of said articles were situated outside of a storage room, vault or safe of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington. That seventy-five percent of

said loss of customers' costs is therefore charged against the \$100,000.00 provision of the insurance policy covering articles in storage rooms, vaults and safes; and twenty-five percent of said loss is charged against the \$10,000.00 coverage of articles outside of storage rooms, vaults and safes.

10.

That the plaintiff has secured settlement with 145 persons suffering loss in said fire and this action was instituted upon the assigned claims of said parties, for which plaintiff is entitled to judgment against the defendant, the Home Insurance Company of New York, for a loss of \$27,565.00, less \$8,200.00 which defendant has previously paid on account, leaving a balance now due and owing in the sum of \$19,365.00.

That said loss is made up from the following named parties who suffered said loss and assigned their claim, together with the amount, being an amount either of the necessary payment for cash [442] of the value of the article destroyed and which was replaced or for which credit was given upon the purchase of a new article:

Value	Owner
\$ 75.00	Albrecht, Mrs. Ernest.
150.00	Andrews, Mabel
180.00	Arteel, Mrs. W. J.
100.00	Babcock, Mrs. Ralph
75.00	Bair, Mrs. Howard
280.00	Balke, Mrs. Emma
200.00	Basey, Mrs. Grace

Value	Owner
50.00	Bauer, Hattie
100.00	Beauchene, Mrs. A. J.
450.00	Beerman, Mrs. W. H.
350.00	Belaire, Mrs. Victor
200.00	Bell, Doris Benoit
400.00	Bitter, Mrs. Gregory
200.00	Bloxom, Mrs. Merritt
150.00	Bobst, Mrs. Mae
150.00	Bodine, Florence
200.00	Brimmer, H. V.
185.00	Brown, Mrs. Fred F.
125.00	Burke, Barbara G.
200.00	Busby, Mrs. Thomas
200.00	Buttke, W. H.
150.00	Campbell, Helen
150.00	Carman, Mrs. Rex
150.00	Cash, Mrs. Harold
150.00	Chadwick, R. E.
100.00	Chance, May
150.00	Clarke, Glen L.
150.00	Clements, James
250.00	Conkey, A. L.
100.00	Cox, Alice
200.00	Cronholm, Mrs. A. L.
200.00	Dasdice, J. A.
500.00	Dawson, Mrs. F. C.
100.00	Dawson, Mrs. F. C.
150.00	Densmore, Mrs. W.
150.00	Dewar, Gladys N.
200.00	Dormaier, C. C.
200.00	Draper, Wm. C.

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Value	Owner
50.00	Edwards, Mrs. Floyd C.
200.00	Erickson, O. H.
100.00	Eschback, Mrs. Ed.
200.00	Etl, Lillian
200.00	Eyman, Mrs. Chas.
200.00	Fetherstone, Mrs. J. E.
25.00	Fiebelkom, Hazel
250.00	Flater, Mrs. Mabel
200.00	Fleming, Mrs. Del.
100.00	Fleming, Mrs. Del
300.00	Foran, Ruth
225.00	Fortier, Mrs. Geo.
150.00	Fox, Mrs. H. R.
200.00	Fraser, Mrs. Ronald
150.00	Fuqua, A. E.
150.00	Cannon, Gertrude
150.00	Goetz, W.
150.00	Griffeth
375.00	Hagne, Harold J.
100.00	Hall, Angeline
175.00	Hamilton, J. C.
200.00	Hanratty
175.00	Harnden, W. G.
150.00	Hartman, Dean
200.00	Hayes, C. P.
150.00	Herrette,
200.00	Hillmer, Beatrice
200.00	Holtzinger, C. R.
75.00	Hornsberger, A.
180.00	Jarvis, Helen

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Value	Owner	
150.00	Johnson, Fred E.	
140.00	Jahr, Edna C.	
350.00	Jones, M. W.	
100.00	Junker, Elizabeth	
200.00	Kinney, C. H.	
225.00	Kious, Mrs. Vernon	
200.00	Knight, Ida	
200.00	Krause, Mary Alice	
250.00	Leach, E. E.	
200.00	Lisle, Ivan B.	
500.00	Logozzo, Elsie	
225.00	Lowenthal, Carl	
150.00	Lyon, W. F.	
125.00	Mace, Clark	
100.00	Magee, Patricia	
200.00	Martinez, M. J.	
350.00	McCorkindale, Elaine	
200.00	McGilvery, G. F.	
200.00	Meek, Eleanor	
200.00	Mercke, J. W.	
200.00	Messer, Lucille H.	[445]
140.00	Metyger, Bee	
300.00	Miller, H. R.	
75.00	Mixon, Betty	
100.00	Mixon, Louise	
150.00	Moore, J. D.	
325.00	Morrill, Florence	
150.00	Marse, Mrs. Opal	
100.00	Munsil, L. W.	
150.00	Nelson, Mrs. Elmer R.	
200.00	Odell, Harry	

Value	Owner
75.00	Orth, J. E.
400.00	Palmer, F. C.
100.00	Palmer, F. C.
135.00	Patnode, Mrs. Mose
200.00	Peterson, Laura
100.00	Pollard, H. E.
150.00	Poulter, Merle
100.00	Pulos, Ada
200.00	Reich, Mrs. Wm.
200.00	Reischl, Irene
200.00	Richards, Gordon
200.00	Ritchie, Clarence
75.00	Robinson, K. G.
200.00	Ross, Nan
200.00	Ryker, Rodney
200.00	Schmidt, G. A.
200.00	Schmidt, Rudy
200.00	Schoonover, Jack
75.00	Shaw, Verda Gayle
200.00	Shirran, W. C.
250.00	Southier, Frank
200.00	Spinner, H. R.
800.00	Stanley, Dorthea
	Stanley, Dorthea
150.00	Stanley, Gladys
100.00	Stoltenow, B. W.
350.00	Stuart, Agnes M.
250.00	Stumpf, John H.
100.00	Taliaferro, Thelma
200.00	Thacker, Cecil
100.00	Thomas, David G.

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Value	Owner
200.00	Thomas, Elmer
200.00	Thompson, J. C.
75.00	Tilton, Mrs. Rex
200.00	Timpke, Glen D.
350.00	Verd, Mrs. Chas.
150.00	Vivian, James
225.00	Wait, Carlyle
200.00	Walsh, C. J.
250.00	Warner, A. K.
200.00	Wiehl, Wright
150.00	Williams, D. A.
200.00	Wilson, Ed.
100.00	Wright, Delbert
350.00	York, Paul F.
400.00	Bryon, Irene

.\$27565.00

11.

That the third-party defendant, Dorothy Riggs, who, having appeared in said action but failed to prosecute her claim and is, therefore, in default.

The Court having heretofore made and entered its Findings of Fact does now making the following

CONCLUSIONS OF LAW:

1.

That the plaintiff, Meryl W. Kirkevold, doing business as Barnes-Woodin Fur Department, be, and he is, hereby entitled to judgment against the defendant, Home Insurance Company of New York, a corporation, in the sum of Nineteen Thousand

Three Hundred and Sixty-five Dollars (\$19,365.00), together with his costs and disbursements herein incurred.

2.

That the Third-party defendant, Dorothy Riggs, be held in default and be granted nothing for her answer.

3.

That all of the third-party defendants, or anyone claiming under or through them, are permanently barred and enjoined from asserting any claim of any kind or nature whatsoever against the plaintiff or the defendant herein for any loss suffered from the loss of furs, fur coats or articles trimmed with furs in that certain fire in the Barnes-Woodin Fur Department on May 9, 1944.

Done in open Court this .. day of, 1946.

.....

District Judge

Presented By:

VELIKANJE & VELIKANJE

/s/ E. F. VELIKANJE,

Attorneys for Plaintiff [448]

[Title of District Court and Cause]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS

Without waiving other objections to the substance and form of plaintiff's proposed findings of fact,

defendant submits its principal objections to the form thereof as follows:

1. Paragraphs 3 and 4 of the findings are incomplete in that they refer to only a very small part of the insurance contract. Our answer quoted the material portions of the policy having a direct bearing upon the issues herein as to various maximum limits of liability. These proposed findings do not fully cover the same. For example, the findings omit the policy requirements that liability cannot exceed the valuations stated on receipts and cannot exceed the cost replacement of the fur coats and that certificates issued were expressly subject to the conditions of the master policy.

2. The last clause of paragraphs 5 is erroneous. Plaintiff has not complied with all the terms and conditions of the policy. It is undisputed that plaintiff wrongfully issued certificates for larger amounts than the valuations shown on receipts and at different times, and that secondly, plaintiff omitted valuations on numerous receipts issued, all of which is contrary to the terms and conditions of the policy. [449]

3. Referring to finding 6, we do not believe there was any proof that the fire was not the result of negligence of plaintiff's employees. On the contrary, the record was silent as to what was the cause of the fire.

4. The figure \$27,415.00 referred to in proposed findings 6 and 10, is incorrect. The same should be \$25.00 less, or \$27,390.00; in view of the fact that

at the Tacoma argument plaintiff's attorney conceded that the liability on the Belaire coat could not exceed \$325.00 rather than \$350.00.

5. The last sentence in paragraph 7 is erroneous. The proof of loss was introduced as an exhibit and is not in our possession. .

6. In paragraph 10 the amount paid in cash by customers is stated as \$1151.01. This is incorrect. This clause should read: "Of which amount customers paid in cash \$4712.47, out of which 20% federal luxury tax is payable, in the total sum of \$3561.46, or a net amount of \$1151.01," etc. Proposed finding 10 is erroneous in stating the amount paid in cash by customers; and the same should be clarified as hereinabove stated.

7. Paragraph 10 states that the total paid on cash settlements was \$14,973.99. This is incorrect. The total of the figures of cash settlement shown by the written releases, which are exhibits herein, is \$14,106.04. This correction by way of reduction in the total amount of cash settlement results in a reduction of \$867.95 (\$14,973.99 less \$14,106.04). Deducting this amount changes the \$27,286.45 figure to \$26,418.50, and the final figure, or amount of recovery herein, \$19,086.45 should be changed in finding 10 and the conclusions of law and judgment by deducting \$867.95 at least, or a final figure not exceeding \$18,218.50.

8. Also, we submit that the findings of fact should contain a list of the names of the customers with whom settlements were made [450] and the cash

amount to which each was entitled under the evidence, aside from the matter of coat replacements. It is true that the final amount of recovery is somewhat less by reason of deducting the net profits of plaintiff on the coat replacements. There is, however, no inconsistency in such findings. It is merely a case where the defendant is entitled to the benefit of five or six different provisions of the policy specifying maximum limits of liability, either total over all liability, or liability as to each specific garment. This list should be followed by a finding such as paragraph 10, with the figures therein corrected as hereinabove stated. The reason for urging this objection is that if this is done the findings would be much more helpful to the appellate court in determining certain of the other issues herein as to liability upon specific fur coats, where, for example, the amount claimed exceeds the figure stated on the receipt.

Respectfully submitted,

CHENEY, HUTCHESON &
GAVIN,

Attorneys for Defendant

Service accepted and copy received this 9th day
of May, 1946.

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1946. [451]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWER TO THE DEFEND-
ANT'S OBJECTIONS TO PLAINTIFF'S
PROPOSED FINDINGS

Comes now the plaintiff in the above-entitled action and in answer to Defendant's objections to plaintiff's proposed findings states as follows, to-wit:

1.

In answer to objection No. 1, it is plaintiff's belief that sufficient is shown in these findings to substantiate the decree. Naturally, the whole policy cannot be quoted and the policy is an exhibit in the case and naturally part of said case and can be referred to as such.

2.

It is plaintiff's belief that all the terms and conditions of the policy have been complied with and do not believe that the court has ruled to the contrary in any instance.

3.

If plaintiff's memory is correct as to evidence, it was testified that the cause of the fire was unknown, but was believed to be defective wiring. There was no evidence that the fire was the result of any negligence on plaintiff's behalf. [452]

4.

Plaintiff, while in Tacoma, stipulated to a reduction of the Logozzo coat of \$150.00, but did not agree to any reduction of \$25.00 on the Belaire

coat. This matter, however, is immaterial as the Court has not based its judgment upon those figures.

5.

Paragraph 5 might be well taken due to the fact that Proof of Loss, introduced as an exhibit, might not now be in defendant's possession; however, it was in defendant's possession at time of trial and we do not believe that it is material or erroneous in said findings.

6.

We do not believe that it is material how the \$1,151.01 is shown, as this was the only amount that was beneficial to appellant; the balance of tax was not in any way an asset or beneficial to him.

7.

Counsel is clearly in error as to figures as stated in paragraph 7, for the figure of cash settlement as testified to by Mr. Kirkevold at the hearing in Yakima on May 2nd, was \$14,973.99. This variance from the amount shown on the releases is due partially to the fact that some of the parties originally agreed to take coats in replacement and signed releases at that time; these parties later changed their minds and took a cash settlement and the releases were not changed. This was due to the fact that it was not contemplated that this case would be submitted on any question of replacement, but would be submitted upon the value of the coats as was submitted at trial and as was agreed upon at the pre-trial hearing. Therefore, this amount should not be reduced by \$867.95.

8.

The Court ruled that it was not necessary, due to the change of manner of reaching a judgment, to list each individual coat and [453] calculate an amount for each coat, this being an impossibility due to the inability to reach any definite percentage or figure on any specific coat of the actual value of replacement. By this method defendant is given an advantage of a lesser amount of judgment than was originally done by placing each coat at a valuation at the time of fire and defendant should not be allowed to take the benefit of the replacement cost on one coat and then another valuation on another coat where this is one loss and is handled as one loss or one actual replacement with reimbursement to plaintiff.

Therefore, Plaintiff respectfully submits that the findings as submitted are correct and any variance is not material or reversible error and should be signed as submitted.

Respectfully submitted,

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE.

(Acknowledgment of Service.)

[Endorsed]: Filed May 14, 1946. [454]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This cause having duly and regularly come on for hearing on the 9th day of April, 1946, upon the

defendant's motion for new trial, and the court having heard the arguments of counsel, and being duly advised in the premises; and the court having stated that prior to the entry of findings and judgment herein the court would give further consideration to the contention of the defendant that liability herein under the policy cannot exceed the cost to the plaintiff of replacing fur coats to customers and to the amount of the net profits of the plaintiff relative to such fur coat replacements;

Now, Therefore, It Is Hereby Ordered that in all other respects the motion of the defendant for entry of judgment in favor of the plaintiff herein in the sum of \$1800.00, and the motion of the defendant for a new trial herein, and each of them, are hereby denied.

Defendant duly excepts and its exceptions are allowed.

Done in open court this 14th day of May, 1946.

CHARLES H. LEAVY,
U. S. District Judge.

Presented by:

CHENEY, HUTCHESON &
GAVIN,

By ELWOOD HUTCHESON,
Attorneys for Defendant.

O. K. as to form.

VELIKANJE & VELIKANJE,
/s/ E. F. VELIKANJE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1946. [438]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter coming on regularly for trial in open court before the Hon. Charles H. Leavy, District Judge, on the 7th day of March, 1946, at Yakima, Washington, plaintiff appearing in person and by his attorneys of record, Velikanje & Velikanje, by E. F. Velikanje, of counsel, and defendant appearing by its attorneys of record, Cheney, Hutcheson & Gavin, by Elwood Hutcheson of counsel, and the court receiving evidence, oral and written, and there being no appearance by or on behalf of the third-party defendant, Dorothy Riggs, and the court being fully advised in the premises, does now make the following

FINDINGS OF FACT

1.

That the plaintiff is engaged in business as the Barnes-Woodin Fur Department in the City of Yakima, Washington, and has filed with the Clerk of Yakima County a Business Certificate of Assumed Name.

2.

That the defendant, Home Insurance Company of New York, is [455] a corporation doing business in the State of Washington and duly licensed to do business in the State of Washington.

3.

That on the 17th day of August, 1942, the de-

fendant, Home Insurance Company of New York, entered into a written contract with said plaintiff, whereby said defendant agreed to insure the plaintiff against loss on furs or garments trimmed with fur, being the property of the customers accepted by the insured for storage, alteration, repairing, cleaning or remodeling, while said furs or garments trimmed with fur were in the custody or in the control of the plaintiff. That said agreement was incorporated in a written contract termed "Furriers-Customers Basic Policy," being No. FC 1824. Said policy further provided, upon an attached endorsement, this policy was extended to cover, during transportation or otherwise, such furs or garments trimmed with fur, the property of customers, for which the assured has issued a certificate of insurance on forms approved by the company; and further provided that an additional premium was made payable for said additional coverage of the issuance of such certificate.

4.

That under the terms and conditions of said policy above referred to, the defendant company obligated itself to pay loss not to exceed the sum of \$100,000.00 on customers' articles lost or destroyed in storage rooms, vaults and safes, and not to exceed \$10,000.00 on customers' goods outside of storage rooms, vaults and safes.

5.

That at all times hereinafter mentioned, from and after the 17th day of August, 1942, up to and

after the 9th day of May, 1944, said policy was in full force and effect, all premiums having been paid, and plaintiff having complied with all the terms and conditions of said policy. [456]

6.

That on or about the 9th day of May, 1944, a loss was sustained at plaintiff's place of business, at 301 East Yakima Avenue, in the City of Yakima, County of Yakima, State of Washington, which was a loss by fire, originating from an unknown cause and not the result of any negligence on the part of the plaintiff, his agent or employees. That as a result of said fire 152 furs, fur coats, and articles trimmed with fur, belonging to customers, which were in the control and custody of the insured for alteration, repairing, cleaning, remodeling, preparation for storage, return to customers and in storage, were destroyed, of the value of \$27,415.00; said value being exclusive of the articles of Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, Mabel G. Smith and Erma Turnell. The last named six parties, all having been made third-party defendants, have failed to appear or prosecute their claim in said action and are in default. That plaintiff consummated settlement with all of the customers suffering damage from said loss, except the above-named parties who were made the third-party defendants.

That on the 21st day of August, 1944, being with-

in the extended time of filing proof of claims, the plaintiff caused to be filed with the Home Insurance Company, and its agent, Fire Company Adjustment Bureau, Inc., detailed proof of loss, showing loss in the sum of \$29,785.00. That said defendant has in its possession said proofs of loss and the originals thereof.

8.

That thirteen of the customers who suffered loss in said fire had their furs and garments trimmed with furs covered by certificate endorsements, being special certificate policies covering the amount beyond that as listed under the assured's legal liability. That [457] said customers had paid an additional premium for said additional coverage, and had filed with said company due proof of loss. That under a letter, dated October 4, 1944, the law firm of Cheney & Hutcheson, appearing for and on behalf of the defendant herein, returned to said customers and policy holders their proof of loss with a notation that settlement would be completed with them.

9.

That seventy-five per cent of the furs, fur coats, or garments trimmed with furs, belonging to customers and destroyed in said fire, were situated in a storage room of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington. Twenty-five per cent of said articles were situated outside of a storage room, vault or safe of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington. That seventy-five per cent

of said loss of customers' coats is therefore charged against the \$100,000.00 provision of the insurance policy covering articles in storage rooms, vaults and safes; and twenty-five per cent of said loss is charged against the \$10,000.00 coverage of articles outside of storage rooms, vaults and safes.

10.

That plaintiff has secured settlement with 145 persons suffering loss in said fire and this action was instituted upon the assigned claims of said parties. That the value of said coats destroyed at the time of the fire, or a maximum value of that listed upon receipts, or the amount of cash necessary to settlement, combined, was \$27,415.00. Plaintiff, however, being engaged in the fur business was able to make settlement with some of the persons suffering loss by replacing or reselling new coats. That the retail value of said coats sold or replaced was \$17,567.62, of which amount customers paid in cash \$1,151.01, leaving a net retail or replacement of \$16,416.61. That plaintiff's approximate net profit on items [458] sold is 25%, making a cost to plaintiff of \$12,312.46; that in addition thereto, on cash settlements plaintiff paid the sum of \$14,973.99; making a total cost of settlement to plaintiff of \$27,286.45, less the sum of \$8,200.00, which defendant has previously paid on account, leaving a balance now due and owing in the sum of \$19,086.45.

11.

That the third-party defendant, Dorothy Riggs,

who, having appeared in said action but failing to prosecute her claim is, therefore, in default.

The Court having heretofore made and entered its Findings of Fact does now making the following

CONCLUSIONS OF LAW

1.

That the plaintiff, Meryl W. Kirkevold, doing business as Barnes-Woodin Fur Department, be, and he is, hereby entitled to judgment against the defendant, Home Insurance Company of New York, a corporation, in the sum of Nineteen Thousand Eighty-six and 45/100 Dollars (\$19,086.45), together with his costs and disbursements herein incurred.

2.

That the third-party defendant, Dorothy Riggs, be held in default and be granted nothing by her answer.

3.

That all of the third-party defendants, or anyone claiming under or through them, are permanently barred and enjoined from asserting any claim of any kind or nature whatsoever against the plaintiff or the defendant herein for any loss suffered from the loss of furs, fur coats or articles trimmed with fur in that [459] certain fire in the Barnes-Woodin Fur Department on May 9, 1944.

Done in Open Court this 14th day of May, 1946.

CHARLES H. LEAVY,

U. S. District Judge.

Presented by:

VELIKANJE & VELIKANJE,

E. F. VELIKANJE,

Attorneys for Plaintiff.

O.K. as to form:

CHENEY, HUTCHESON &

GAVIN,

ELWOOD HUTCHESON,

Attorneys for Defendant.

[Endorsed]: Filed May 14, 1946. [460]

In the District Court of the United States for the
Eastern District of Washington, Southern Division

Civ. No. 210

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a Corporation,
Defendant,

CLARA HARBIN, MRS. WILLIAM McCLURE,
MABEL MILLER RAY, DOROTHY RIGGS
and MABEL G. SMITH and ERMA TUR-
NELL,

Additional Third-Party Defendants.

JUDGMENT AND DECREE

The above-entitled matter coming on regularly
for trial in open court before the Hon. Charles H.
Leavy, District Judge, on the 7th day of March,
1946, at Yakima, Washington, plaintiff appearing
in person and by his attorneys of record, Velikanje
& Velikanje, by E. F. Velikanje of counsel, and
defendant appearing by its attorneys of record,
Cheney, Hutcheson & Gavin, by Elwood Hutcheson
of counsel, and the Court receiving evidence, oral
and written, and the Court having heretofore made
and entered its Findings of Fact and Conclusions
of Law, and being fully advised in the premises;
it is, now

Here Ordered, Adjudged and Decreed that the plaintiff, Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, be, and he is, hereby granted judgment against the defendant, Home Insurance Company of New York, a corporation, in the sum of Nineteen Thousand Eighty-six and 45/100 Dollars (\$19,086.45), together with interest from date hereof until paid, together with plaintiff's costs and disbursements incurred or expended in said action; and, it is [461]

Further Ordered that the third-party defendant Dorothy Riggs be, and she is, hereby in default; and, it is

Further Ordered that all of the third-party defendants in the above-entitled action, or anyone claiming under or through them, are permanently barred and enjoined from asserting any claim of any kind or nature whatsoever against the plaintiff or the defendant herein for any loss suffered from the loss of furs, fur coats or articles trimmed with furs, in that certain fire in the Barnes-Woodin Fur Department on May 9, 1944.

Done in Open Court this 14th day of May, 1946.

CHARLES H. LEAVY,

District Judge.

Presented by:

VELIKANJE & VELIKANJE,

E. F. VELIKANJE,

Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1946. [462]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Home Insurance Company of New York, a corporation, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment in favor of the plaintiff entered in this action on May 14, 1946, and from the order denying defendant's motion for new trial and from each and every other adverse order, ruling and decision of the court herein.

CHENEY, HUTCHESON &
GAVIN,

/s/ ELWOOD HUTCHESON,

Attorneys for Defendant and Appellant, The Home Insurance Company of New York.

Copy mailed to attorneys for plaintiff June 19, 1946.

A. A. LaFRAMBOISE,

Clerk U. S. District Court.

By THOMAS GRANGER.

[Endorsed]: Filed June 19, 1946. [463]

[Title of District Court and Cause.]

ORDER FIXING AMOUNT OF
APPEAL BOND

Upon application of the defendant, It Is Hereby Ordered that the amount of supersedeas and cost

bond on appeal herein is hereby fixed in the total sum of \$22,000.00, Twenty-two Thousand Dollars.

Done in open court this 14th day of May, 1946.

CHARLES H. LEAVY,
U. S. District Judge.

Presented by:

CHENEY, HUTCHESON &
GAVIN,

By ELWOOD HUTCHESON,
Attorneys for Defendant.

O. K.

VELIKANJE & VELIKANJE,
E. F. VELIKANJE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1946. [464]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND
ON APPEAL

Know All Men By These Presents: That we, The Home Insurance Company of New York, a corporation, the defendant above named, as principal, and The Home Indemnity Company, a corporation organized under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, the plaintiff above named, in the just and full sum of Twenty-

two Thousand and No/100 Dollars (\$22,000.00) for which sum, well and truly to be paid, we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of May, 1946.

The condition of this obligation is such, that whereas, the above named plaintiff on the 14th day of May, 1946, in the above entitled action and court, recovered judgment against the defendant above named for the sum of Nineteen Thousand Eighty-six and 45/100 Dollars (\$19,086.45), together with costs as taxed in the sum of \$28.40; [465]

And, whereas, the above named principal has heretofore given due and proper notice that it appealed from said judgment of the above entitled court to the Circuit Court of Appeals for the Ninth Circuit; and the court having heretofore entered an order fixing the amount of this bond in the above-mentioned sum;

Now, Therefore, if the said principal, The Home Insurance Company of New York, a corporation, shall pay to Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, the plaintiff above named, and shall satisfy in full the said judgment heretofore entered herein, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the said judgment is affirmed, and shall pay and satisfy in full such modification of the said judgment and such costs, interest and damages as the said Appellate

Court may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

THE HOME INSURANCE
COMPANY OF NEW YORK,
By ELWOOD HUTCHESON,
Its Attorney.

THE HOME INDEMNITY
COMPANY,
By A. U. HOELTING,
Its Attorney in Fact.

(Corporation Seal.)

The foregoing bond is hereby approved.

CHARLES H. LEAVY,
District Judge.

[Endorsed]: Filed June 11, 1946. [466]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

Defendant will rely upon the following points in the prosecution of its appeal from the judgment herein:

I.

The District Court erred in making the following rulings upon admissibility of evidence and in admitting the following evidence offered by the plaintiff:

1. In admitting in evidence plaintiff's exhibit 4.

2. In admitting in evidence plaintiff's exhibit 6.
3. In admitting in evidence plaintiff's exhibit 7.
4. In admitting in evidence plaintiff's exhibit 8.
5. In admitting in evidence plaintiff's exhibit A-1.

II.

The District Court erred in entering its findings of fact on the evidence as follows:

6. In making finding of fact number 5.
7. In making finding of fact number 6, and particularly finding therein that the fur garments destroyed in said fire were of the value therein stated, to-wit, \$27,415.00. [467]
8. In making finding of fact number 8.
9. In making finding of fact number 9.
10. In making finding of fact number 10.

III.

The District Court further erred as follows.

11. In making conclusion of law number 1 that plaintiff is entitled to recover judgment against the defendant in the sum of \$19,086.45 and costs.

12. The court erred in entering judgment in favor of the plaintiff against the defendant in the sum of \$19,086.45, and costs.

13. The court erred in denying defendant's motion for new trial.

14. The court erred in overruling each and all

of defendant's objections to plaintiff's proposed findings of fact and conclusions of law.

15. The court erred in making and entering judgment in favor of the plaintiff against the defendant for any sum in excess of \$1800.00.

16. The court erred in finding and holding that there was any storage room, within the meaning of the insurance policy, on the mezzanine floor of the Barnes-Woodin Department Store where the fire damage involved herein occurred.

17. The court erred in finding and holding that by reason of said fire any liability of the defendant arose under said insurance policy in excess of the sum of \$10,000.00, by reason of the limitation [468] in the insurance policy limiting said liability to the sum of \$10,000.00 as to any damages occurring outside of storage rooms, vaults and safes.

18. The court erred in finding and holding that defendant was liable as to any fur garment in excess of the agreed valuation thereof stated on the receipt issued by the plaintiff to the customer pursuant to the provision of the insurance policy involved herein.

19. The court erred in finding and holding that defendant was liable to plaintiff for any fur garments as to which no valuation was stated by the plaintiff on the receipts issued by him to his customers, as required by the insurance policy.

20. The court erred in finding and holding that defendant is liable to plaintiff as to any fur gar-

ments in excess of the amount stated on the receipt issued therefor in instances where insurance certificates were also issued as to said fur garments, and especially in instances where said receipts and certificates were issued at different times and for different amounts.

21. The court erred in finding and holding, with reference to fur garments which were replaced by the plaintiff, that the liability of the defendant is in excess of the wholesale cost to plaintiff of purchasing said replaced fur garments.

22. The court erred in finding and holding with reference to said replaced fur garments that the full amount of the gross profits of the plaintiff thereon should not be deducted in determining the amount of defendant's liability to plaintiff with reference thereto. [469]

23. The court erred in finding and holding that in determining the amount of liability as to said replaced fur garments that plaintiff is entitled to credit for any federal or state luxury or sales taxes with reference to said replaced fur garments, there having been no taxable sale thereof.

24. The court erred in finding and holding that plaintiff is entitled to any recovery against the defendant as to the replaced fur garments by reason of the fact that plaintiff failed to sustain his burden of proof to show with sufficient, specific, definiteness, and certainty the amount of his actual loss for

which he is entitled to recovery with reference thereto.

CHENEY, HUTCHESON &
GAVIN,

ELWOOD HUTCHESON,

Attorneys for Defendant and
Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 19, 1946. [470]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above entitled Court:

Defendant designates the following as the record to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of the above entitled case:

1. Summons.
2. Complaint.
3. Special Appearance.
4. Notice of intention to file petition and bond for removal.
5. Petition for removal.
6. Bond for removal.
7. Order of removal.
8. Notice of removal and filing of record in Federal Court.

9. Order granting motion to add additional parties.
10. Answer and counter-claim.
11. Reply.
12. Default judgment as to additional third-party defendants.
13. Admission. [471]
14. Order relative to pre-trial hearing.
15. Transcript of proceedings (in two volumes, including portion of proceeding at Tacoma on April 9, 1946, and all proceedings at Yakima on May 2, 1946).
17. All original exhibits to be transmitted to Circuit Court of Appeals without copying the same.
18. Order for transmission of exhibits.
19. Plaintiff's proposed findings of fact and conclusions of law (not entered by the court).
20. Motion for new trial and affidavit.
21. Minute entry at the court hearing at Tacoma, April 9, 1946.
22. Defendant's objections to plaintiff's proposed findings.
23. Plaintiff's answer to defendant's objections to plaintiff's proposed findings.
24. Order denying motion for new trial.
25. Findings of fact and conclusions of law.

26. Judgment and decree.
27. Notice of Appeal, together with date of filing thereof and record of mailing thereof.
28. Order fixing amount of appeal bond.
29. Supersedeas and cost bond on appeal.
30. Designation of record.
31. Appellant's statement of points.

CHENEY, HUTCHESON &
GAVIN,
ELWOOD HUTCHESON,
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 19, 1946. [472]

[Title of Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing type-written pages, numbered 1 to 473, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein, as called for by the designation of record on appeal filed by counsel for the defendant,

as the same remains on file and of record in my office, and that the same constitutes the record on appeal of the defendants, The Home Insurance Company of New York, from the Judgment and Decree of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify that included in the transcript of record on appeal is contained all original exhibits except plaintiff's exhibit 3 which is transmitted separately. Said original exhibits being transmitted pursuant to order of the District Court.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$48.30, and that the same has been paid in full by Elwood Hutcheson, attorney for Defendant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 5th day of July, 1946.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

[Endorsed]: No. 11376. United States Circuit Court of Appeals for the Ninth Circuit. The Home Insurance Company of New York, a Corporation, Appellant, vs. Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed July 8, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11376

THE HOME INSURANCE COMPANY OF NEW
YORK. a Corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as Barnes-
Woodin Fur Department,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Comes now The Home Insurance Company of
New York, appellant above named, and for its

Statement of Points upon which it intends to rely in this appeal adopts the Statement of Points filed by it in the United States District Court in connection with its notice of appeal and included in the transcript of record prepared and certified by the Clerk of the said District Court.

Appellant designates the entire record herein other than exhibits to be printed and also that the following portions of the exhibits herein be printed: Plaintiff's exhibits 1, 2 and 3, and Defendant's exhibits A and the first typewritten page of B-1.

CHENEY, HUTCHESON &
GAVIN,

ELWOOD HUTCHESON,
Attorneys for Defendant and
Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed July 8, 1946. Paul P.
O'Brien, Clerk.

